Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1995

CENTRAL REGIONAL SCHOOL DISTRICT,

Petitioner,

vs.

M.C. AND G.C. on behalf of their son, J.C.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a court award of compensatory education beyond the age of twenty-one in favor of an educationally handicapped student under the Individuals with Disabilities Education Act require a showing that a school district has committed a "gross deprivation" of the right to a free and appropriate education or has failed to act in "good faith" in the provision of special educational services?

II. Is the intervention of the Court required to resolve the substantial conflict which has been created by the Third Circuit's summary rejection of the prevailing Second Circuit compensatory education rule in favor of a new and substantially less rigorous court imposed rule?

III. Where a profoundly retarded and extremely low functioning handicapped student makes limited measurable progress within a state-run special educational day placement, does the inability of the school district to demonstrate substantial measurable progress provide a sufficient factual and legal basis to compel the local district to provide a full-time year round residential placement?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
I. A court award of compensatory education beyond the age of twenty-one in favor of an educationally handicapped student under IDEA requires a showing that a school district has committed a "gross deprivation" of the right to a free and appropriate education or has failed to act in "good faith" in the provision of special education services.	5
II. Where a profoundly retarded and extremely low functioning handicapped student makes limited measurable progress within an educational day placement, the inability of the school district to	

Contents

Page

demonstrate substantial measurable progress does not provide a sufficient factual and legal basis to compel the local district to provide a full-time residential placement. 9

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) 8, 9, 10, 11, 12

Burlington v. Department of Education, 471 U.S. 359 (1985) 5, 6

Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988) 4, 6

Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995) 6, 10

Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3rd Cir. 1993) 10

Garro v. Connecticut, 23 F.3d 734 (2d Cir. 1994) 3, 6

Geis v. Bd. of Educ., 774 F.2d 575 (3rd Cir. 1985) 10

In Re Conklin, 946 F.2d 306 (4th Cir. 1991) 7, 11

Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988) 4, 6

Contents

	Page
Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991)	3, 6
Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986), *cert. denied*, 459 U.S. 909 (1982)	4, 6
Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990)	6
Statutes Cited:	
20 U.S.C. § 1400, *et seq.*	1
20 U.S.C. §§ 1401-1461 (1982)	6
20 U.S.C. § 1415(e)(2)	2
28 U.S.C. § 1254(1)	1
Other Authorities Cited:	
N.J.A.C. 6:28-3.5(d)(6)(iii)	7
N.J.A.C. 6:28-3.9	2
N.J.A.C. 6:28-8.4	2
APPENDIX	
Appendix A — Opinion of the Third Circuit Court of Appeals Dated April 17, 1996	1a

Contents

Page

Appendix B — Opinion of the United States District Court Dated August 31, 1995 ..... 19a

Appendix C — District Court Opinion Denying Summary Judgment Dated July 1, 1994 ..... 41a

Appendix D — Decision of Administrative Law Judge Dated September 10, 1993 ..... 53a

Petitioner, Central Regional School District, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the District Court in this case are reproduced at 19a and 41a. The opinion of the state Administrative Law Judge is reproduced at 53a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This matter arises under the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*

STATEMENT OF THE CASE

J.C. is a fourteen year old student who is both physically and educationally handicapped. Pursuant to the New Jersey Administrative Code governing the provision of special education services to the handicapped, J.C. is classified as "Eligible for Day Training". This educational classification, undisputed in these proceedings, is appropriate where the pupil exhibits a level of mental retardation in the profound range, and is unable or incapable of understanding or responding to spoken words or communicating needs on a day to day basis. Pursuant to New Jersey's special education regulations which specifically

provide for and anticipate that pupils classified as "Eligible for Day Training" will be placed and educated at an appropriate day training center operated by the State of New Jersey, Department of Human Services, Division of Disabilities. N.J.A.C. 6:28-3.9; 6:28-8.4. J.C. has since 1987 been placed at the Ocean County Day Training Center in accordance with these administrative regulations.

The educational appropriateness of J.C.'s day placement was challenged in due process proceedings conducted before a state Administrative Law Judge (ALJ). Following the presentation of expert witnesses by the parties, the ALJ found that J.C.'s day program at the Ocean County Day Training Center was tailored to his educational needs, followed the goals and objectives of his Individualized Educational Plan (IEP), had produced educational success for J.C., and was educationally appropriate within the least restrictive environment in accordance with state law. (App. D, 64a-66a).

J.C.'s parents brought an action in the United States District Court for the District of New Jersey pursuant to 20 U.S.C. § 1415(e)(2) for review of the ALJ's decision. The District Court conducted a limited evidentiary hearing for the purpose of attempting to determine whether J.C.'s limited and inconsistent educational progress was due to his limited potential or the inappropriateness of some aspect of his day placement. (App. C, 51a-52a). Based upon the results of said hearing, as well as a review of the record established before the ALJ, the District Court directed that J.C. be placed in a full-time residential facility. (App. B, 40a). The Court denied the parents' claim for compensatory education beyond the age of twenty-one, concluding that said claim was factually "inappropriate" in this case where the school district had provided J.C. with an education "which it believed in good faith was appropriate." (App. B, 38a). In reaching this result, the District Court relied

upon the "good faith" standard for awarding compensatory education followed by the Third Circuit in *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991).

On appeal, the United States Court of Appeals for the Third Circuit held that the evidence supported the District Court's conclusion that a residential program was required for J.C. to make meaningful educational progress, and that it meets the requirements of IDEA. (App. A, 9a).

In the second portion of its opinion the Court of Appeals concluded that the District Court had applied an "incorrect standard" in denying J.C.'s compensatory education claim. (App. A, 17a). The Court of Appeals then went on to summarily reject the prevailing Second Circuit compensatory education standard ("requiring gross procedural violation") set forth in *Garro v. Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994), and announced for the first time a new standard within the Third Circuit for the evaluation of claims for compensatory education. (App. A, 15a-16a). The new compensatory education standard announced by the Court of Appeals was formulated as follows:

> Thus, our holding can be summarized as follows: a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.

(App. A, 16a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve the now existing split between the federal circuit courts of appeals regarding the applicable legal standard to be applied in considering claims brought under IDEA by educationally handicapped students for compensatory education beyond the age of twenty-one. The present state of the law will result in claims brought against local school districts in one state being resolved utilizing legal criteria which are substantially dissimilar to the criteria used to judge the identical claims brought against local districts in contiguous states within the same geographic region. This conflict among the federal circuit courts of appeals has left the law in a state of serious disarray and has now created a situation in which important special education issues will be decided without any measure of judicial consistency or uniformity, based entirely upon the physical location of the school district involved in a given controversy.

The majority of published decisions of the circuit courts of appeals dealing with the appropriate standard for the award of compensatory education require either bad faith or culpable conduct on the part of a local school district to be demonstrated. *See, e.g., Burr v. Ambach*, 863 F.2d 1071, 1073 (2d Cir. 1988) (failure to consider placement in an appropriate existing special program); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988)(unnecessary prolonging of litigation); *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (failure to provide any educational services). The decision of the Third Circuit Court of Appeals in this case therefore stands alone as an aberration among the decisions of the circuits; a judicially created rule of law which has summarily dispensed with the quantum of proof necessary to trigger an award of compensatory education in all of the other circuits.

The analysis required of the courts by the new Third Circuit compensatory education rule is fraught with uncertainty and vagueness in critical areas such as the specific identification of cognitive deficiencies and the measurement of what may be "appropriate" educational progress in students who are severely and profoundly retarded such as J.C. By dispensing with the requirement of either bad faith or culpable conduct, the Third Circuit has opened the door to claims for compensatory education in virtually any situation in which the local school district has been unable to demonstrate significant educational progress in profoundly handicapped students, notwithstanding what may be completely appropriate and regular modifications of their special education programs. In this way, local districts may now be required to provide compensatory education in the absence of any proof that such districts have failed in their obligations under IDEA. This unprecedented legal formulation paves the way for the virtually automatic filing of meritless claims against local school districts, and cannot be permitted to stand.

I.

A COURT AWARD OF COMPENSATORY EDUCATION BEYOND THE AGE OF TWENTY-ONE IN FAVOR OF AN EDUCATIONALLY HANDICAPPED STUDENT UNDER IDEA REQUIRES A SHOWING THAT A SCHOOL DISTRICT HAS COMMITTED A "GROSS DEPRIVATION" OF THE RIGHT TO A FREE AND APPROPRIATE EDUCATION OR HAS FAILED TO ACT IN "GOOD FAITH" IN THE PROVISION OF SPECIAL EDUCATION SERVICES.

Our federal courts began to recognize a right to an award of compensatory education beyond the age of twenty-one as an available extension of this Court's holding in *Burlington v.*

Department of Education, 471 U.S. 359, 370-71 (1985), that tuition reimbursement was an appropriate form of relief to aggrieved parents of handicapped students under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1982). In recognizing that both IDEA and its predecessor entitled children to a free appropriate education, the federal courts have extended the original *Burlington* rationale in order to provide relief where there has been a deprivation of this right. *See Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986), *cert. denied*, 459 U.S. 909 (1982) (*quoting Burlington*, 471 U.S. at 370-71).[1]

Up to the point at which the present case abandoned the requirement to prove some form of culpable conduct as a prerequisite for an award of compensatory education, the Third Circuit had consistently cited with approval the "gross deprivation" or "lack of good faith" formulations followed by the other circuit courts of appeals. *Lester H.*, 916 F.2d at 873; *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3d Cir. 1995). *See also, Burr v. Ambach*, 863 F.2d 1071, 1073 (2d Cir. 1988) (failure to consider placement in an appropriate existing special program); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988) (unnecessary prolonging of litigation); *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) (failure to provide any educational services).

In this case, the Court of Appeals has summarily disapproved the prevailing Second Circuit compensatory education standard requiring a "gross deprivation" of the right to a free and appropriate education,[2] on the grounds that said

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1. Thereafter, the Third Circuit adopted the position of the *Miener* court and approved a court imposed compensatory remedy. *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3rd Cir. 1990), *cert. denied*, 499 U.S. 923 (1991).

2. *Garro v. Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990).

standard is "imprecise" or otherwise "not anchored in the structure or text of IDEA." (App. A, 15a). This criticism of the Second Circuit standard, however, ignores the problematic imprecision of the new Third Circuit rule itself as well as the substantial difficulties which will certainly be encountered by litigants and the courts if the Third Circuit's radical departure in this area of the law is allowed to stand.

This new rule and judicially created standard will have the effect of triggering liability for compensatory education notwithstanding a school district's good faith compliance with both the letter and spirit of IDEA. Indeed, in virtually every case in which the extremely low functioning level of a handicapped student inhibits the attainment of educational progress beyond inconsistent or even *de minimus* levels, the new Third Circuit rule will result in an award of compensatory education in spite of the district's ability to demonstrate appropriate IEPs and the provision of equally appropriate special education services in support of the IEPs. This result flies in the face of holdings by other federal courts which have recognized the inequity of holding local school districts liable for the low cognitive and performance levels presented by many educationally handicapped students.[3] These considerations appear especially relevant and applicable to J.C., whose undisputed classification as "eligible for day training" requires a level of retardation in the profound range, and an inability to understand or respond to spoken words, or to communicate needs on a day to day basis. N.J.A.C. 6:28-3.5(d)(6)(iii). Although there is no evidence in the record upon which to conclude that there is some untried special education program or intervention which could actually produce

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3. In *In Re Conklin*, 946 F.2d 306 (4th Cir. 1991) the Fourth Circuit Court of Appeals noted that the inherent nature of some educationally handicapping conditions may well preclude traditional notions of "acceptable" annual improvement in performance *despite* a school district's compliance with IDEA.

a greater quantum of educational progress for J.C., the Third Circuit has adopted the District Court's hypothesis that J.C. possesses "untapped potential" which forms the basis for the direction to place him in a full-time residential facility.[4] (App. A, 9a), (App. B, 36a).

This new compensatory education standard is further flawed by the requirement that in cases where a child is not receiving more than *de minimus* educational benefit, the school district must step in to "correct the situation" or to "rectify the problem." (App. A, 16a). In the cases involving profound retardation and multiple handicapping conditions such as J.C., it is unreasonably simplistic to view the students' inherently low levels of cognitive and physical functioning as merely a "problem" or "situation". These cases require a complex, interactive network of varied special education resources and educational interventions; the need for modifications and adjustments to the educational programming often becomes apparent only after a student fails after some time to progress in accordance with the bona fide expectations of the educators. To impose liability for compensatory education in these circumstances is to punish the school district for the profoundly handicapped student's inability to reach goals and objectives which may well have been entirely reasonable and appropriate for a given academic time period, based upon past performance. This result is in conflict with this Court's holding in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) that the basic floor of opportunity will be met when a child receives "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 201-03. If the new Third Circuit rule is permitted to stand, local

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4. Interestingly, the District Court simultaneously found that "The evidence that J.C. will be able to progress beyond his current level is tenuous." (App. B, 22a).

school districts will be held liable for the provision of costly compensatory education services beyond the age of twenty-one, notwithstanding the compliance of those districts with their legal obligations under *Rowley*. This obligation cannot be made to depend entirely upon the ability of profoundly handicapped students to demonstrate progress without regard to the good faith and reasonableness of the school district's educational programming and attempts to maximize educational progress; the decision of the court of appeals cannot stand.

II.

WHERE A PROFOUNDLY RETARDED AND EXTREMELY LOW FUNCTIONING HANDICAPPED STUDENT MAKES LIMITED MEASURABLE PROGRESS WITHIN AN EDUCATIONAL DAY PLACEMENT, THE INABILITY OF THE SCHOOL DISTRICT TO DEMONSTRATE SUBSTANTIAL MEASURABLE PROGRESS DOES NOT PROVIDE A SUFFICIENT FACTUAL AND LEGAL BASIS TO COMPEL THE LOCAL DISTRICT TO PROVIDE A FULL-TIME RESIDENTIAL PLACEMENT.

Throughout these proceedings, from the due process hearings held before the Administrative Law Judge through the review of the record by the Third Circuit Court of Appeals, it has been uniformly recognized that J.C.'s extremely low levels of functioning have precluded his educators from being able to demonstrate an objectively measurable quantum of progress from one academic year to the next. The school district did present the type of proof which was available to demonstrate the attainment of educational benefit under *Rowley*, *i.e.*, reductions in the frequency of undesirable behavior, gradual expansion of the ability to utilize eating utensils, increases in the number of attempts to communicate basic daily needs, etc. However, the

Court of Appeals discounted the significance of these proofs regarding educational benefit and progress in favor of the District Court's naked presumption that J.C. had "untapped potential" which rendered his day placement educationally inappropriate. This presumption is without adequate factual support in the record, and this Court should review and reconsider the issue of residential placement in a manner which recognizes the practical difficulties of producing objectively measurable levels of progress in profoundly retarded and low functioning students.

In recently deciding a number of cases which required it to revisit the parameters of the *Rowley* standard, the Third Circuit has itself confirmed that IDEA requires a placement and program which is reasonably calculated to produce some educational benefit, and not to provide an optimal educational situation. *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).[5] Likewise, the mere showing that some, or even all of the IEP's goals and objectives were not met in a given academic year cannot in and of itself support a conclusion that the IEP itself is educationally inappropriate. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031 (3rd Cir. 1993).

There is little if any articulable proof in the record upon which to base the court-ordered obligation for the school district to place J.C. in a full-time residential facility. After the Administrative Law Judge found that residential placement was not necessary for J.C. to derive educational benefit from his day placement, the District Court judge, subsequent to the evidentiary hearing on the issue of J.C.'s potential for educational progress, noted that "the evidence that J.C. will be

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5. Notwithstanding its discussion of the *Rowley* standard, the Court of Appeals decision leaves open the question of whether New Jersey requires a higher standard for measuring educational appropriateness. (App. A, 8a at footnote 2); *see Geis v. Bd. of Educ.*, 774 F.2d 575 (3rd Cir. 1985).

able to progress beyond his current level is tenuous." (App. B, 22a). This inability to demonstrate the potential for measurable educational progress is the hallmark of profoundly handicapped students like J.C., yet in this case the Court of Appeals was willing to indulge the unproven assumption that J.C.'s "untapped potential" required his removal from the state operated day training center where he was receiving individual and small group instruction from certified teachers of the handicapped, along with other profoundly handicapped students who were also classified as "eligible for day training."

The Fourth Circuit has recognized that some students, due to the severity of their handicap, will never be able to demonstrate "acceptable" annual improvement or to reasonably advance from grade to grade, even with Herculean efforts by the local school district which go well beyond the requirement of IDEA. *In re Conklin*, 946 F.2d 306 (4th Cir. 1991). In this case, however, the Third Circuit has ignored these practical realities in favor of a residential placement based upon undefined and unmeasurable "untapped potential". The Court of Appeals' use of the concept of "untapped potential" within the context of the actual proofs before that Court was inappropriate, misleading and erroneous. The record actually demonstrated that the existing day training program had successfully "tapped" J.C.'s potential by permitting him to develop certain informal communications systems without having those systems specifically addressed in the IEP. This is an indicator of the day placement's educational appropriateness and ability to bring out the highest and best behaviors and educational progress in J.C., notwithstanding his profound level of mental retardation. For the Court of Appeals to base its overall decision regarding residential placement on this finding of "untapped potential" made it virtually impossible for the school district to demonstrate compliance with the *Rowley* standard, notwithstanding the multitude of expert witnesses, child study

team members, educators and documents offered by the school district and by the day training staff in support of the day placement IEP.

There is no basis in this case for a finding that J.C.'s educational needs require residential placement or that the day placement IEP offered and implemented by the Central Regional School District was not educationally appropriate under *Rowley*. Because there is nothing in the record to suggest that J.C. suffers from an educationally handicapping condition which is substantially different or more severe than any of the other students classified as "eligible for day training" who are attending the same day training center, there is no basis to differentiate J.C.'s claim for residential placement from the claims which could be raised by any or all of his fellow handicapped day placement students.

Review by this Court of the residential placement issue is necessary to confirm the mandate of *Rowley* that educationally handicapped students are entitled to a special education program which is reasonably calculated to confer some educational benefit, but not the "optimal" or "best" education possible.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE THIRD CIRCUIT COURT OF APPEALS DATED APRIL 17, 1996

Filed April 17, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5606

M. C.; AND G. C., ON BEHALF OF THEIR SON, J.C.

v.

CENTRAL REGIONAL SCHOOL DISTRICT

Appellant

NO. 95-5623

M. C.: AND G. C., ON BEHALF OF THEIR SON, J.C.

Appellants

v.

CENTRAL REGIONAL SCHOOL DISTRICT

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 93-cv-04752)

Argued: November 14, 1995

Appendix A

Before: BECKER, SCIRICA, Circuit Judges, and COHILL, *District Judge**

(Filed April 17, 1996)

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* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(e)(2). Pursuant to IDEA, a school district is required to provide a disabled child with a "free appropriate education." 20 U.S.C. § 1400(c). J.C., a severely mentally retarded sixteen-year-old male, has attended the Ocean County Day Training Center ("OCDTC") since 1987. In 1992, concerned about the appropriateness of their son's instruction, J.C.'s father and stepmother, M.C. and G.C. ("plaintiffs"), began proceedings to secure both a residential placement for J.C. and compensatory education beyond his twenty-first year to make up for what they believed to be long-standing deficiencies in his program. In 1995, the district court ordered that J.C. be relocated to a residential school, but refused to award compensatory education because it found that the defendant, Central Regional School District ("Central Regional," "school district," or "district"), had, in good faith, provided J.C. with some educational program. Central Regional now appeals the residential placement, and plaintiffs cross-appeal the determination regarding compensatory education.

Rejecting Central Regional's challenge, we hold that the district court used the proper legal standard when it granted residential placement, and that its factual findings regarding that claim are supported in the record. We will therefore affirm the award. The cross-appeal requires us to revisit an issue reserved in our recent decision, *Carlisle Area School v. Scott P.*, 62 F.3d 520, 537 (3d Cir. 1995), and to decide the proper standard for an award of compensatory education. A school district that knows

or should know that a child has an inappropriate individualized Education Program (IEP) or is not receiving more then a *de minimis* educational benefit must, of course, correct the situation. We hold that, if it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem. Because the district court applied an incorrect "good faith" standard, we will reverse on the cross-appeal and remand for further proceedings consistent with this opinion.

I. Factual Background/Procedural History

A. *Factual Background*

J.C.'s IEP stresses personal and self-help goals such as toileting and eating as well as more general communication, domestic, recreation, vocation, and community training skills. His preschool records reflect that he progressed well during his initial years of education. Following J.C.'s placement at OCDIC in 1987, his development slowed. Since 1989, J.C. has made little consistent improvement and in some aspects has even regressed.

For example, in 1988 and 1989, J.C.'s teachers, Juanita Jones and Susan Trainor, reported that J.C. could remove his shirt independently. In 1990, Trainor indicated that J.C. could remove his shirt only after it was started for him. By 1992, J.C.'s school records did not reflect any independent disrobing efforts. Trainor related only that J.C. was "cooperative" and would "extend [his] arm/leg for dressing."

Likewise, pulling his pants up and down in preparation for toileting has been a self-help goal in J.C.'s IEP since 1989. By

February 1991, J.C. was reportedly pulling his pants down with "moderate" physical assistance on two out of five days. In May 1991, J.C. continued to lower his pants with "moderate" assistance. In May 1992, J.C. had regressed to where he was able to pull his pants down on two out of five days only with "maximum" physical assistance. Similar reversion occurred in J.C.'s ability to spear food, to drink from a cup, to communicate, and to pay attention.

Not only did J.C. perform poorly on stated IEP goals, but his IEP also failed to include several important objectives. For example, Central Regional's records indicate that J.C.'s self-stimulatory behavior, like chewing his shirt, was a serious problem impairing his educational progress. Despite this fact, J.C.'s IEP contained no strategies to reduce the incidence of this behavior.

Another gap in J.C.'s IEP was parent training. According to Trainor, in order for J.C. to make steady progress, his program needed to be consistently implemented both inside and outside of the classroom throughout all his waking hours. Nevertheless, the IEP did not include parent training. Minutes of the March 15, 1990, IEP meeting indicate that the plaintiffs requested someone from the school to come to their home to help with toileting and independent feeding. They were never told that parent training was a related service that could be provided under J.C.'s IEP.

B. *Procedural History*

1. The Administrative Hearing

Concerned that J.C. was not receiving a free appropriate education as guaranteed under IDEA, M.C. and G.C. wrote to

Central Regional to request that J.C.'s 1992-93 IEP be revised and that he be placed in a residential school. When Central Regional refused to change the IEP, M.C. filed a Petition for Hearing with the New Jersey Department of Education.

Following a hearing, an Administrative Law Judge (ALJ) found that OCDTC had provided an "appropriate education" for J.C. To give form to the "appropriate education" standard, the ALJ applied the Supreme Court's holding in *Board of Education v. Rowley,* 458 U.S. 176, 200 (1982), that a school district must provide instruction "sufficient to confer some educational benefit upon the handicapped child." According to the ALJ, a child with J.C.'s disabilities was not capable of more than very "limited and varied progress." As such, the ALJ concluded that J.C.'s slight improvement "at times" in his ability to prepare himself to toilet, eat with a spoon, and drink from a cup satisfied *Rowley's* requirement that his schooling provide him "some educational benefit." In his view, any residential placement went far beyond J.C.'s educational needs.

2. The District Court Hearing

M.C. and G.C. appealed the ALJ's decision to federal district court. The court agreed with the ALJ's conclusions that J.C.'s achievements appeared to be *de minimis* as well as inconsistent and scattered, and that in some areas J.C. had even regressed. However, the court could not determine, based on the evidence presented at the administrative hearing, whether J.C.'s inadequate progress was a reflection of his (lack of) potential or of the inappropriateness of his placement at OCDTC. Accordingly, it convened a hearing to receive supplemental evidence.

In the wake of this hearing, the district court reversed the decision of the ALJ and ordered residential placement. The district court concluded that the ALJ had applied the wrong legal standard in reaching his determination. The ALJ had relied on the *Rowley* formulation that a disabled child need only receive "some educational benefit" from his instruction. However, according to the district court, the ALJ failed to consider our cases interpreting that decision. *See Polk v. Cent. Susquehana Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Bd. of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986). Both Polk and Diamond make clear that an appropriate IEP must result in more than *de minimis* benefits to satisfy *Rowley*'s "some educational benefit" standard. As we wrote in *Diamond*, a plan for a severely handicapped student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement." *Id.* at 991. According to the district court, the "limited and varied" progress that the AW found was *de minimis* and therefore not sufficient to satisfy IDEA.

In determining that residential placement was appropriate for J.C., the court credited the testimony of the plaintiff's expert, Dr. Dana Henning.[1] According to Dr. Henning, J.C.'s IEP did not sufficiently address his needs. She testified that J.C. was capable of more than the *de minimis* results he had realized at OCDTC, but that he needed the intensive, round-the-clock instruction of a residential school to receive meaningful benefit from his education. Central Regional now appeals the residential

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1. Dr. Henning has eighteen years of experience in teaching, assessing, evaluating and making educational recommendations for persons with severe or profound handicaps and challenging behaviors. She estimated that she had evaluated close to a thousand severely and profoundly retarded children, one-third of whom had self-stimulatory behavior problems.

placement order. We review the district court's legal standard de novo and its factual findings for clear error. The district court denied the plaintiffs' request for compensatory education, and plaintiffs now appeal that determination. At issue is the legal standard used by the court, over which we exercise de novo review.

II. The Residential Placement

Central Regional launches a three-pronged attack upon the district court's order of residential placement. First, it argues that the district court misapplied *Rowley,* the principal authority establishing the standard of education services required under IDEA. We conclude that the district court did not misconstrue the *Rowley* rule. As this Court explained at length in *Polk* and *Diamond, Rowley* does not mean that IDEA is satisfied by affording the student a *de minimis* benefit. The record supports the district court's conclusion that if J.C. received any value from the education afforded by the defendant, it was trivial and that is not sufficient.[2]

Second, Central Regional contends that the district court erred in finding that J.C. had "untapped potential," and in basing its order for residential placement upon that determination. We hold that the court's conclusion that J.C had untapped potential was not clearly erroneous. As we have explained in *Kruelle v. New Castle County School District,* 642 F.2d 687, 693 (3d Cir. 1981), special education for a low-functioning child stresses (at least initially) basic life skills such as dressing, eating, and

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2. We therefore do not need to address J.C.'s argument that, even if the *Rowley* standard were satisfied, New Jersey obligates Central Regional to meet a higher standard. *See Geis v. Bd. of Educ.,* 774 F.2d 575, 583 (3d Cir. 1985).

communicating. The record reflects that J.C. had much potential in these areas. For instance, Dr. Henning testified that J.C., on his own, would attempt to communicate his wants and needs to others by leading them where he wanted to go, an action which she concluded showed motivation and promise.

The court's decision to use its finding of untapped potential as a basis for residential placement was also not in error. Dr. Henning, upon whom the court appropriately relied, attributed J.C.'s minimal progress at OCDTC to an inadequate program which, among other deficiencies, failed to address his self-stimulatory behaviors, and to an inappropriate placement, which did not allow him to practice his skills beyond the school day. She testified that J.C. would develop more fully in a residential school. The court was entitled to rely on her well-supported conclusions.

Third, Central Regional asserts that the district court incorrectly concluded that the least restrictive educationally appropriate setting for J.C. was a full-time residential facility. In essence, the school district argues that the order for residential placement conflicts with the statutory preference for inclusion. *Cf. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993). On the record in this case, we are satisfied that a residential program is required for J.C. to make meaningful educational progress and that it meets the requirements of IDEA.

As we have detailed above, in view of the deficiencies in J.C.'s past program, he could no longer make adequate progress in a day setting. The evidence supports the district court's conclusion that any attempts to reduce J.C.'s severe self-stimulatory behavior or improve his toileting, eating, and communication skills would succeed only in the intense atmosphere of a round-the-clock residential setting where a

consistent educational program could be enforced throughout all of J.C.'s waking hours. A residential setting would also allow J.C. to learn skills in their natural atmosphere. According to Dr. Henning, effective instruction for J.C. (as well as many other severely disabled children) requires that skills be presented in their usual environment and at the natural time of day. For instance, J.C. could be better taught to cook in the residence's kitchen than in the artificial setting of a daytime classroom because he had trouble "generalizing" or transferring the skills learned in one environment to another. The trial record, thus supports the conclusion that a residential setting is the least restrictive placement for J.C. at this time. Our case law also supports this result. *See, e.g., Diamond,* 808 F.2d at 992 (3d Cir. 1986) (residential placement is "least restrictive" environment for severely disabled child); *Kruelle,* 642 F.2d at 693-95 (3d Cir. 1981) (residential placement is only "appropriate education" for seriously disabled child).

Decisions from other circuits also bolster our refusal to disturb the district court's determination that placement in a residential center is appropriate here, where a less structured environment cannot do the lob. *See Drew P. v. Clarke County Sch. Dist.,* 877 F.2d 927, 930 (11th Cir. 1989) (residential placement necessary for child with mental retardation and infantile autism to "make meaningful educational process"), *cert. denied,* 494 U.S. 1046 (1990); *Abrahamson v. Hershman,* 701 F.2d 223 (1st Cir. 1983) (residential placement authorized if essential for student to make educational progress); *see also* 20 U.S.C. § 1401(16); 34 C.F.R. §§ 300.302, 300.551.

The district court's order, insofar as it requires residential placement, will therefore be affirmed. We will not direct modification of the order in response to plaintiffs' further contention that the district court erred in not directing Central

Regional to place J.C. in a *specific* residential school. We find no abuse of discretion in that regard, though the district court is free to reconsider the matter of placement on remand. We note, in conclusion, that the residential placement may only be temporary. Once J.C. accumulates the life skills that he did not acquire while at OCDTC, he may well be able to return to a day placement. This will appear from the required yearly IEP evaluation.

III. Compensatory Education

A. *Definition/ Historical Background*

We now turn to the more difficult aspect of this case — the cross-appeal of J.C. from the district court's order denying compensatory education. Under IDEA, a disabled student is entitled to free, appropriate education until he or she reaches age twenty-one. 20 U.S.C. § 1412(2)(b). A court award of compensatory education requires a school district to provide education past a child's twenty-first birthday to make up for any earlier deprivation.[3]

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3. At least one federal court, *see Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000, 1002 (8th Cir 1991), and numerous administrative law judges have upheld or awarded compensatory education during the summer months rather than after age twenty-one. *See Perry A. Zirkel, Compensatory Education — Questions and Answers,* 10 The Special Educator 1, 147 (Dec. 10, 1994).

Parenthetically, the term compensatory education may also be used in a different sense to refer to special programs and services provided to "at-risk" students who are not succeeding in school but do not qualify for special education. Such programs include alternative schools, pregnancy and parenting programs, and group counseling programs. *See, e.g.*, Catherine P. Clark. *Compensatory Education in Texas* (1993).

Appendix A

Federal courts began awarding compensatory education after the Supreme Court determined in *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370-71 (1985), that tuition reimbursement was appropriate under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1982) (IDEA's predecessor). In a typical reimbursement scenario, a parent who believed that a child was not receiving an appropriate public education would place the child in private education at his or her own expense. Under *Burlington*, if a court later determined that the private placement was the appropriate one, the school district would have to reimburse the parent.

Tuition reimbursement was the Court's vehicle for satisfying both IDEA's pronouncement that children are entitled to a free appropriate education and the congressional intent to provide relief for the deprivation of this right. *See Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). Extending the *Burlington* decision, the Eighth Circuit in *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986), *cert. denied*, 459 U.S. 909 (1982), awarded compensatory education. The court reasoned that, like retroactive tuition reimbursement, compensatory education required school districts to " 'belatedly pay expenses that [they] should have paid all along.' " *Id.* at 753 (*quoting Burlington*, 471 U.S. at 370-71). The court "was confident that Congress did not intend the child's entitlement to *free* education to turn upon her parent's ability to 'front' its costs." *Id.* In *Lester H.*, we adopted the position of the *Miener* court and approved a compensatory remedy. 916 F.2d at 873.[4]

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4. In the process, we made clear that compensatory education could be awarded to plaintiffs who had already reached age twenty-one. *Lester H. v. Gilhool*, 916 F.2d 865, 872 (3d Cir. 1990).

Appendix A

B. *Formulating a Standard*

In the case at bar, the court devoted only one paragraph of its opinion to compensatory education and disposed of the issue in the following manner:

> With respect to plaintiffs' request for compensatory education, the Court concludes that such relief is inappropriate under the facts of this case. Plaintiffs rely on *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991), in which the school district knew before the child entered the school system that the district would be unable to provide an appropriate education. *Id.* at 873. The decision to permit compensatory education was premised on the district's failure to fulfill what it knew or should have known were its obligations. *Id.* The facts of the present case are easily distinguishable. Defendant provided J.C. with an education which it believed in good faith was appropriate. A difference of opinion as to the adequacy of an educational program is not equivalent to a complete and total failure to provide a child with an education. Therefore, this Court will not grant plaintiffs' motion with respect to this issue.

Thus, the district court applied a "good faith" standard in determining whether to award compensatory education. We review this approach de novo.

Appendix A

In order to define the correct standard for granting compensatory education, we must delineate the threshold of deficiency in the school board's stewardship necessary to trigger an award. Unfortunately, there is little caselaw or legal commentary to guide us. Likewise there are no New Jersey or federal regulations to direct our inquiry. While this is not the first time we have contemplated this issue, the facts of our previous cases have made our past analyses relatively straightforward.

In *Lester H.*, 916 F.2d at 873, we upheld an award of two-and-one-half years of compensatory education due to the school district's outrageous behavior. In the fall of 1984, the district admitted that the twelve-year-old plaintiff was not receiving an appropriate education. Despite the existence of at least six suitable schools, the district did not locate an appropriate placement until January of 1987. *Id.* at 873. We wrote:

> [W]e hold that the district court did not abuse its discretion when it fashioned this remedy for Lester. The court's award merely compensates Lester for what everyone agrees was an inappropriate placement from 1984 through January, 1987 and belatedly allows him to receive the remainder of his free and appropriate public education.

Id.

In *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3d Cir. 1995), we reviewed a district court's decision to grant six months compensatory education. We reversed the award because the record contained no evidence indicating that the relevant IEP was inappropriate. We concluded that, while we did not need to

define the precise standard for awarding compensatory education, we could at least determine that it was necessary — though not sufficient — to show that some IEP was actually inappropriate. *Id.* at 537. We noted that most cases awarding compensatory education had involved quite culpable conduct[5] but determined that a grant of compensatory education did not require bad faith on the part of the school district. *Id.* We left our analysis there, but must now flesh out the standard left sparse by *Carlisle.*

The Second Circuit has conditioned an award of compensatory education on the presence of a "gross" deprivation of the right to free and appropriate education. *See Garro v. Connecticut,* 23 F.3d 734, 737 (2d Cir. 1994) (requiring "gross procedural violation"); *Mrs. C. v. Wheaton,* 916 F.2d 69, 75 (2d Cir. 1990) (requiring "gross violation," defined as coercion of disabled child into terminating his right to further education). We reject this formulation because, in addition to being imprecise, it is not anchored in the structure or text of IDEA.

If the compensatory education standard is to spring from the

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5. *See, e.g., Burr v. Ambach,* 863 F.2d 1071, 1073 (2d Cir. 1988) (awarding compensatory education where state institution disqualified a student because of its purported inability to accommodate his multiple handicaps without mentioning or considering placement in an extant special program for multiple handicapped students); *Jefferson County Bd. of Educ. v. Breen,* 853 F.2d 853. 857-58 (11th Cir. 1988) (awarding compensatory education to deter states from unnecessarily prolonging litigation); *Miener v. Missouri,* 800 F.2d 749, 754 (8th Cir. 1986) (reversing denial of compensatory education for a child who spent three years in mental health ward of a state hospital after district failed to provide any educational services notwithstanding its own evaluation recommending such services).

Act, it must focus from the outset upon the IEP — the road map for a disabled child's education. *See* 20 U.S.C. § 1414(a)(5). When an IEP fails to confer some (i.e., more than *de minimis*) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by IDEA. It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure.[6]

The school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem. Thus, our holding can be summarized as follows: a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. We believe that this formula harmonizes the interests of the child, who is entitled to a free appropriate education under IDEA, with those of the school district, to whom special education and compensatory education is quite costly.

Obviously the case against the school district will be stronger if the district actually knew of the educational deficiency or the parents had complained. But a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently

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6. This precept is consistent with our decision in *Carlisle Area School v. Scott P.*, 62 F.3d 520, 537 (3d Cir. 1995). Where we held that an award of compensatory education required a finding that an IEP was inappropriate.

sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators — and of the multi-disciplinary team that annually evaluates the student's progress — to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly.

While we have little hard data on compensatory education, we do know that administrative law judges in this Circuit have awarded it. Our new standard meshes with the approach taken by these judges. *See In Re Jeremy H.*, No. 593, slip op. at 27 (Special Education Appeals Review Panel Pa. May 21, 1993) (upholding compensatory education in order to rectify an inappropriate IEP). Our holding also accords with the conclusions of a recent article reviewing federal court strategies for awarding compensatory education. *See* Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995). That article maintains that, in general, the prerequisite of a compensatory education award has not been the gross, egregious, or bad faith conduct of the school district but rather a simple finding that a child has received an inappropriate education.

Since the district court applied an incorrect standard, its order denying compensatory education must be reversed. The court found that J.C.'s IEP was inappropriate. It determined that the majority of the skills that J.C. possessed at the time of Dr. Henning's evaluation were gained *before* J.C. was placed at OCDTC in 1987, that the same rate of progress did not continue after he was placed at OCDTC, and that J.C. plateaued in 1989. Thus, J.C.'s educational deprivation appears to have lasted a long time. On remand, the district court should determine when

the Central Regional knew or should have known that J.C.'s IEP was inappropriate or that he was not receiving more than *de minimis* educational benefit; it should also define the reasonable time within which the district should have done something about it. Compensatory education should accrue from that point forward.

The order of the district court will therefore be affirmed in part and reversed in part and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT DATED AUGUST 31, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 93-4752 (AET)

M.C. and G.C. on behalf of their son J.C.,

Plaintiffs,

v.

CENTRAL REGIONAL SCHOOL DISTRICT,

Defendant.

OPINION

THOMPSON, CHIEF JUDGE

This matter is before the Court after an evidentiary hearing conducted on November 14 and 15, 1994. Counsel on behalf of plaintiffs was Rebecca Spar, Esq. of Cole, Schotz, Meisel, Forman & Leonard. Appearing on behalf of defendant was Richard J. Kaplow, Esq. of Weinberg & Kaplow. We have considered the evidence presented at the evidentiary hearing, as well as the record established before the Administrative Law Judge.

Appendix B

Background

Plaintiffs filed the present action in this Court on October 25, 1993 appealing the decision of an Administrative Law Judge ("ALJ") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, *et seq*. The ALJ found that J.C. was receiving an appropriate education under the act and concluded that he was not entitled to residential placement.

By Opinion and Order dated July 1, 1994, this Court denied plaintiffs' motion for partial summary judgment and defendant's cross-motion for summary judgment. The Court concluded that the record before the ALJ contained deficiencies which required this Court to conduct an evidentiary hearing. Specifically, the Court referred to the ALJ's finding that there was insufficient evidence to determine J.C.'s potential and in turn whether the progress exhibited by J.C. reflected his abilities.

At the hearing before this Court, defendant presented the expert testimony of Jean L. Balinky, Ed.D. Dr. Balinky's qualifications include over 19 years as a child psychologist. She is a member of the "independent" child study team often used to evaluate and prepare Individualized Education Programs ("IEP") for children under the IDEA. Presently she is Director of the Psychological Clinic at Rutgers University Graduate School of Applied and Professional Psychology. During Dr. Balinky's career she has evaluated approximately thirty retarded children and she has taught several as well. Her educational background does not include current class work with special education children, although in 1956 she did have a limited certificate in special education and a limited certificate in elementary education. She did not practice long enough in either field to become permanently certified. Dr. Balinky spent approximately

one and a half hours observing J.C. at OCDTC on August 30, 1994. She did not interview his teachers or the staff there and she did not visit him in his home or in any other setting. Her report was based on her observations during her visit to the school, J.C.'s May and November 1992 IEPs, this Court's July 1994 Opinion and the briefs submitted by the parties in connection with that Opinion.

Plaintiffs presented the testimony of Dana Henning, Ed.D. as an expert in the field of special education. Dr. Henning's qualifications included a doctorate in special education. Both her educational background as well as her professional background focus primarily on educating the severely retarded. She visited OCDTC on two separate days and spent four hours observing J.C. on each visit. She visited J.C. in his home and saw him in his room, the kitchen, the family room and outside. She spoke with J.C.'s speech therapist and informally interviewed the principal at OCDTC, J.C.'s teacher and his parents. Her report was based on her personal observations, the record before the ALJ (but not the transcripts of testimony given before the ALJ), J.C.'s school records before attending OCDTC (including his pre-school records) and her personal knowledge of two residential programs. The breadth of her training and experience as well as her detailed informed analysis and evaluation of J.C.'s condition ultimately persuaded the Court in plaintiffs' favor.

The Court reiterates the following findings from its July 1994 Opinion:

> This Court has reviewed the record on appeal in its entirety. At the outset it is important to note that J.C.'s parents have not formally objected to the IEP which is now

before the Court. They have made only informal requests for more communication between the school and J.C.'s home-care providers. Similarly, the need to implement a behavior modification program focusing on J.C.'s self stimulatory behavior was not formally addressed during the formulation of the 1991-1992 IEP. However, the need for a behavior modification program is acknowledged by all parties and it appears that such a program has been crafted. . . .

A. J.C.'s Potential

The evidence that J.C. will be able to progress beyond his current level is tenuous. J.C. is severely retarded and is therefore unlike a student who can be taught in a regular classroom or who is able to achieve academic success somewhat comparable to others his age. Some children such as J.C. might be so limited in their ability to progress that the normal measure of benefit required under the IDEA must be adjusted.

Defendant's witnesses have testified that they have achieved some success with J.C., but that his progress has been highly inconsistent. John Budenas, J.C.'s case manager, testified that J.C.'s IEPs contain reasonable goals and objectives taking J.C.'s limitations into account. (Trans 1:252 at 21-1:253 at 16.) Despite Budenas' testimony

that the goals were realistic, he admitted that J.C. had not accomplished those goals. (Trans. 1:185 at 11-20.) However, the OCDTC staff who testified before Judge Scott stated that measuring J.C.'s potential is very difficult because of his profound level of retardation. The achievements which J.C. can be expected to make are measured in very small increments, and his ultimate progress is measured in developmental months rather than years. J.C.'s teacher, principal, social worker and case manager all testified that complete mastery of the goals set forth in an IEP is rarely accomplished. Mastery is viewed as the ultimate achievement for a child whose development is so severely delayed.

Plaintiff's expert witness, Dr. Booker, shed little light on whether J.C. would, with any certainty, be able to progress beyond his current station. Dr. Booker testified that J.C. was capable of making "educational progress . . . beyond the progress that is being made now." (Trans. 3:190 at 8-11; *see also* Trans. 3:222 at 5-23, 4:32-33, 4:45 at 13-4:46 at 12.) However, Dr. Booker's general assessment must be viewed with caution. When asked to evaluate J.C.'s potential in a specific area he declined stating:

Well in assessing that I think that it would be my opinion that that would relate to an

evaluation of the plan and his achievement using different techniques, so I wasn't — I wasn't in the position to arrive at that conclusion.

(Transcript 4:73.) Gregory Gowen has for many years been an OCDTC employee, respite care provider for J.C. and substitute teacher for J.C. Gowen testified that "I think from what we've seen and observed that J. has — definitely has potential." (Trans 4:119 at 21-22; *see also* 4:116-120.) Gowen's determination was based on his observations of J.C. during the time they spent together which was often on a one to one basis. The Court notes that Mr. Gowen has no formal training in special education.

A report by Dr. Charles I. Scott, Jr. of the Alfred I. duPont Institute concludes: "This patient has rather profound mental retardation and severe behavior disorders. I feel these are certainly interfering with his educational goals and that he would profit by being in a highly structured, stable residential facility so that he could reach his maximum opportunity for learning." (Plaintiffs' Ex. p-14 at 7.)

The testimony of those qualified individuals who have worked most closely with J.C. strongly suggests that inconsistent progress made in minute steps is the most one

can hope to achieve with J.C. Plaintiff's witnesses paint a more optimistic picture, but have not worked closely with J.C. and their conclusions are educated guesses.

B. J.C.'s Progress

J.C.'s achievements have been highly inconsistent and scattered. In some areas J.C. has even regressed including the frequency with which he independently feeds himself, i.e. regularly versus only when he enjoys the lunch being served. (Plaintiffs' Ex. P-1 at 3, 5 and P-7 at 7.) The ALJ summarized J.C.'s progress by stating that "the program at OCDTC has produced some educational success for J.C." *J.C.*, OAL No. EDS 720, Slip Op. at 11. A careful review of the "Summary Level of Performance" forms dated May 20, 1988, May 23, 1989, May 21, 1991 and May 20, 1992 reveals that some progress has been made in the areas of following verbal commands and maintaining eye contact. Dr. Booker also acknowledged some improvement in the areas of using a fork, drinking from a cup and pulling a chair in and then pushing it out when J.C. sits and stands. (Transcript 3:221.) However, J.C. has made little consistent progress since 1989 in the areas of dressing and undressing himself, toileting and eating with utensils. Although interim reports indicate fleeting instances of progress, no consistent improvement in these

areas has been shown. (Plaintiffs' Ex. P-2, P-17 and P-20.)

C. The Need for Residential Placement

Reports by Drs. Booker, Scott and Barabas suggest that residential placement is necessary for J.C. to reach his potential.[1] (Plaintiffs' Ex. P-10, P-14, P-16.) These reports indicate that as J.C. grows older, stronger and larger, it becomes increasingly difficult for him to receive the home-care he requires in order for him to progress at OCDTC. (*Id.*) J.C.'s teacher, Ms. Trainor, as well as Mr. Budenas, G.C. and Dr. Booker testified that J.C.'s self-stimulatory behavior impedes his progress and that intense behavior management and other programs must be implemented during all of J.C.'s waking hours. (Trans 1:199-200, 1:251-252, 3:78 at 1-11, 3:94 at 9-13, 3:122-125, 3:190-191, 3:195-196 at 3, 3:205 at 18-21, 3:208 at 14-19, 3:225 at 24-3:226 at 9, 3:230 at 14-3:231 at 22, 4:73-77, 4:104 at 13-16, 5:133 at

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1. The reports submitted by Drs. Scott and Barabas indicate that such placement is required for J.C. to reach his maximum potential. Under *Rowley* and its progeny in the Third Circuit, an individual is not entitled to an education which maximizes his/her potential. In certain cases, where a day care setting has provided almost no progress, it appears that conferring a meaningful educational benefit may equate to achieving maximum potential. *See Polk*, 808 F.2d at 992 (citations omitted). However, this Court's evaluation of J.C.'s IEP does not include maximizing J.C.'s potential as a goal.

12-19.) Mr. Gowen who worked in the after-school program with J.C. at OCDTC testified that little communication exists between staff of the after school program and the regular OCDTC day program. (4:103 at 18-4:104 at 12.)

(*M.C. and G.C. v. Central Regional School District*, Civ. No. 93-4752, Opinion at 4-7 (D.N.J. July 1, 1994)).

Summary of the Testimony

A. Dr. Balinky's Report

Dr. Balinky's report and testimony included a general review of OCDTC. She commented on the facility's bright, cheerful and very clean atmosphere. She also stated that the staff appeared to be warm, helpful and outgoing. J.C.'s classroom was large and contained a good variety of equipment. There were five students in the classroom and three adults at all times: one teacher certified in teaching the handicapped as required by the New Jersey Administrative Code, and two teachers' aides. Dr. Balinky observed J.C. on the toilet and being removed from the toilet. She noticed that he washed his hands on his own after being assisted with pulling his pants up. J.C. also retrieved his glasses from the shelf where he places them before entering the commode area. Dr. Balinky observed that J.C. had difficulty using his left hand, particularly his fingers. She opined that this physical limitation would limit his ability to dress himself using the techniques presently being taught by the OCDTC staff. Dr. Balinky noted that J.C. has no verbal communication skills and does not evidence signs of ever being able to verbally express himself. However, she commented that he communicates by

leading people to various items or locations, or by placing himself near a certain area. For example, she learned that J.C. will move to the toileting area to communicate that he needs to use the toilet. Dr. Balinky acknowledged that this form of communication is effective only if the OCDTC staff is cognizant of J.C.'s movements. Dr. Balinky did not notice significant self-stimulatory behavior and did not consider it to be a major problem.

Dr. Balinky noted that J.C. shows only minimal indication of ability to hear and no indication of ability to imitate sounds. She noted that he is able to eat with a spoon from an adaptive bowl. He can eat with a fork, but is unable to spear with a fork. J.C. has poor binocular vision but can handle a cup and drink without choking. Dr. Balinky also observed that J.C. was being talked to by the staff during the entire period of her visit. He was exposed to a good deal of interaction. He is very sociable and enjoys meeting people and interacting with them. She did note that there is a wide functional range in the class. The other students are not able to sit up and are not ambulatory. Some cannot swallow.

Dr. Balinky further testified that the challenged IEP has a vocational component which has been brought into the classroom. She observed J.C. learning to operate an electronic stapler as part of learning to collect a sheath of papers, staple them and then put the stapled package in a pile. J.C. appeared to have serious difficulty maintaining his focus on this activity as well as difficulty stapling the sheath because of poor vision and impaired depth perception. Dr. Balinky stated that she visited other classrooms at OCDTC including the most advanced room, to which J.C. would next proceed. The most advanced classroom has increasingly age appropriate vocational training.

Appendix B

Dr. Balinky stressed the importance of the approximately ten trips which J.C.'s class takes into the community each year. He is taken horseback riding, swimming and bowling. She said that spending time in the community provides a "reason" for J.C. to learn. Moreover, the trips provide stimulation through curiosity and the exposure to new people, places and ideas. The remainder of Dr. Balinky's testimony discussed specific events she observed during her visit including:

(1) the use of specific verbal commands which if not followed resulted in physical assistance by the OCDTC staff;

(2) use of an interactive television with the physical assistance of staff to identify pictures. Dr. Balinky noted that given his visual difficulties she was unsure how effective this technique was for J.C.;

(3) use of a communication board with various kinds of snack foods and

(4) observing J.C. successfully use a spoon to eat cereal.

Dr. Balinky ultimately concluded that J.C. showed reasonable growth given his overall functional level. He continues adding new skills and refining other ones. Although she acknowledged a drop in progress during the 1992 school year, she attributed that to hormonal changes resulting from puberty. Dr. Balinky noted that presently his progress is better and that OCDTC conferred a meaningful educational benefit on J.C. between 1992 and her observations in September of 1994.

Appendix B

B. Dr. Henning's Report

Dr. Henning's report and testimony provides interesting insight into J.C.'s potential. She stated that during his pre-school years, J.C. had an I.Q. roughly half that of a non-handicapped child. She further testified that J.C. had made significant progress and had a variety of skills prior to entering OCDTC. Although his first two years at OCDTC showed improvement, the educational benefit to J.C. appears to have tapered off since 1989. Dr. Henning compared J.C.'s early progress to his subsequent plateau. She concluded that, absent a degenerative disease, there was no reason for a decrease of lack of progress in J.C.'s level of achievement. Her testimony was that the concept of a "plateau" was no longer generally recognized for profoundly retarded children. Dr. Henning noted that fleeting instances of some skills, such as using a fork, are indicative of greater potential. She attributed J.C.'s lack of consistency to his current programs low level of intensity and inadequate reinforcement throughout his waking hours. She opined that J.C.'s progress since 1987 is insufficient given his skills. She concluded that J.C.'s lack of achievement is due to the absence of a clear cut educational plan. Moreover, she views the various IEPs which have been developed as inconsistent in terms of the goals they set forth. Dr. Henning also testified that some of the specific implementations described in the IEPs are not in place in the class room (e.g. no picture of a toilet is in the bathroom stall).

With respect to self-stimulatory behavior, Dr. Henning observed a significant number of incidents where J.C. self-stimulated and where his behavior went unnoticed by the staff. Dr. Henning also referred to occasions where J.C. was left for an extended period, forty minutes to listen to a story on a cassette tape. Not only did she conclude that this was a poor use of his

limited time in school, but it provided him with the opportunity to self-stimulate.

In evaluating the program OCDTC has provided for J.C., she acknowledged that the "functional skills" approach, chosen by the principal at OCDTC, was most appropriate. Dr. Henning compared the functional skills program implemented at OCDTC with the "textbook" model of the program. The comparison revealed several positive techniques used by the OCDTC staff as well as multiple deficiencies in the program used for J.C. Dr. Henning praised OCDTC for having age appropriate toys and attempting to teach age appropriate skills. However, she stated that J.C.'s program did not include sufficient intensity, interdependence or partial participation.[2] Dr. Henning testified at some length as to the definitions of these terms and as to their importance to J.C. Without repeating her explanations, the Court is satisfied that they are an essential aspect of the functional skills approach and that J.C.'s current program does not include them. Moreover, Dr. Henning testified that she observed a classroom at the Morris County Day Training Facility which successfully implemented all the necessary aspects of a functional skills program.

Dr. Henning went on to testify that, J.C.'s future progress is contingent upon residential placement. Aside from the inadequacies she found at OCDTC, Dr. Henning testified that any day facility would be inappropriate for J.C. because he needs to develop "generalization" skills. The concept of

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2. According to Dr. Henning, J.C. is very social, but is hampered in his effort to interact with other students because he is the most advanced in his class. Dr. Balinky testified that J.C. was the most advanced in his class and therefore received the lion's share of the teacher's time and energy.

generalization, according to Dr. Henning, is the application of a skill learned in one environment to a different setting. For example, if J.C. were taught at OCDTC to dress himself after going to the toilet, he would be unable to apply the skill of dressing himself at home in the morning, or at the pool after swimming. J.C. needs to be taught functional skills in the environment in which he will use them. Dr. Henning described for the Court that she observed J.C. walk to the sink at OCDTC, take a can of juice, and begin to pour the juice into a glass.[3] Dr. Henning did not observe similar acts by J.C. in his kitchen at home.

Her belief is that in order for J.C. to learn to generalize or to learn skills in a way that will be useful to him, he needs a single plan, consistently implemented during all of his waking hours. Obviously, only a residential facility would be able to provide J.C. with that type of intensive, consistent program.

With respect to J.C.'s progress at OCDTC, Dr. Henning testified that statistical information might be somewhat misleading. Even though J.C. may have shown minimal improvement in some skills at OCDTC, the improvement data do not reflect the lack of change in his skills outside of OCDTC.

Further Findings of Fact

The most difficult aspect in evaluating whether a profoundly retarded student, such as J.C., is entitled to

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3. The aide interrupted J.C., prevented him from pouring the juice, told him to take a seat and then brought him water. Dr. Henning testified that the aide's actions prevented him from developing the skills of reaching out for the juice and of pouring. Moreover, the aide discouraged future attempts at obtaining juice for himself by bringing J.C. water.

residential placement under the IDEA is ascertaining whether his minimal progress in day placement is the product of an inappropriate setting or of the student's limited ability. Dr. Balinky's report identified some progress in various areas and commented on the positive aspects of the OCDTC program. She also noted certain deficiencies resulting from J.C.'s visual problems. Dr. Henning indirectly acknowledged Dr. Balinky's observations, but went on to testify about the impact of the overall program and about J.C.'s potential. Much of the experts' testimony was consistent. They primarily disagreed about J.C.'s level of self-stimulatory behavior. In light of Dr. Balinky's limited exposure to J.C., the Court finds Dr. Henning's observations more reliable. The experts also differed in their final conclusions. Dr. Balinky's conclusion that J.C.'s program is appropriate rests upon her assessment that his progress has been consistent with the expectations for a child of his skills. Dr. Henning's conclusion that J.C. requires residential placement in order to receive a meaningful benefit rests upon her assessment that his progress has been unsatisfactory and that a twenty-four hour a day immersion in a single learning environment is essential to his development.

Discussion

I. Standard of Review Under the IDEA

A district court reviewing the decision of an ALJ "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2). The decision of the district court must be an "independent determination based on a preponderance of the

evidence." *Geis v. Bd. of Educ.*, 774 F.2d 575, 583 (3d Cir. 1986). The amount of deference to be given the administrative proceedings is a matter left to the discretion of the district court. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218 (3d Cir. 1993) (citing *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988)). The ALJ's findings of fact must be considered, but may be accepted or rejected by the reviewing court. *Id.* Due weight must be given to the administrative proceedings, not, however, to the prevailing party. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982); *Oberti*, 995 F.2d at 1218 (1993). The Third Circuit has concluded that the burden of proof does not shift from those who originally bore it at the administrative level *Oberti*, 995 F.2d at 1218-19. Defendant, therefore, retains its burden of proof in the instant action to prove that J.C.'s IEP is appropriate. *Id.* at 1218.

II. Standard for Determining the Adequacy of Progress

The Supreme Court in *Rowley* held that the basic floor of opportunity will be met when a child receives "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 201-03. The Court limited its holding by explaining that varying degrees of disability and the individual needs of each child make it difficult to establish "one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. The Third Circuit has interpreted *Rowley* on at least two occasions. *See Polk v. Central Susquehana Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989) and *Bd. of Educ. of E. Windsor Regional School District v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986). In both *Polk* and *Diamond*, the Third Circuit concluded that an appropriate IEP will result in more than *de minimis* benefits. *Polk*, 853 F.2d at 172 and *Diamond*, 808 F.2d at 991. The plan for

a severely handicapped student such as J.C. will satisfy the requirements of the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement." *Diamond*, 808 F.2d at 991. The benefit to the disabled student must be meaningful, "more than mere access to the schoolhouse door." *Polk*, 853 F.2d at 182. The *Polk* Court went on to conclude:

> The teaching of *Diamond* is that, when the Supreme Court said "some benefit" in *Rowley*, it did not mean "some" as opposed to "none." Rather, "some" connotes an amount of benefit greater than mere trivial advancement.

Id. at 183.

The IEP is at the core of IDEA. *Rowley*, 458 U.S. 182; *Polk*, 853 F.2d at 173. The IEP sets for the goals and objectives which will be used to determine whether the child is receiving a free and appropriate education as required by the IDEA. 20 U.S.C. § 1401(a)(20); *Lascari v. Board of Education*, 116 N.J. 30, 48 (1989). The issue before the Court is whether the services received by J.C. and the progress achieved by J.C. meet the requirements of the IDEA.

Unfortunately, the Court concludes that the ALJ used an erroneous standard in examining J.C.'s IEP and the benefits he received. The ALJ held that defendant met its burden under the IDEA because it showed that J.C. had received limited varied progress including some educational success. However, both *Polk* and *Diamond* require more than *de minimis* benefits. For a child with J.C.'s potential, the IDEA requires at least the opportunity to achieve more than varied and limited progress.

Specifically, J.C. is entitled to learn skills in a way which allow him to generalize the skills to other aspects of his daily routine.

The complete record before the Court shows that J.C.'s limited improvement in the classroom has not affected his overall functional development. Most of the goals in J.C.'s IEP have not been met, despite their reasonableness as stated by members of the child study team.[4] None of the alternatives offered by OCDTC has furthered J.C.'s educational progress. Constant changes in respite care workers who are not education specialists have hampered J.C.'s progress. Uncontradicted testimony indicates that OCDTC's program is deficient in its application of the functional skills approach and in teaching J.C. generally applicable skills. Especially revealing is the progress J.C. has made on his own at OCDTC. He has developed certain communication skills not specifically set forth in the IEP. These advancements lead the Court to find that J.C. has untapped potential. Therefore, Court concludes that day placement at OCDTC has not provided J.C. with a free and appropriate education as required under the IDEA.[5]

For all of the foregoing reasons, the Court also concludes that residential placement is the appropriate alternative. A residential program is the only appropriate (and least restrictive) means of education for some disabled children with severe retardation and behavioral problems. *Diamond*, 808 F.2d at 992.

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4. Dr. Henning testified that goals in an IEP should be chosen so that the student can achieve them.

5. The Court will not address the issue of whether New Jersey residents are entitled to a higher level of educational progress because the Court has concluded that under the federal standard J.C.'s needs are not being met.

Appendix B

"Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981) (citations omitted). The Third Circuit has concluded that when educational needs are inextricably tied to medical needs district court have a basis for holding that medical services are an "essential prerequisite for learning." *Id.* Similarly, this Court concludes that for such a child as J.C., a meaningful education is inextricably tied to learning functional skills in an intensive twenty-four hour a day environment.

Dr. Henning's opinion is that J.C.'s independent development at OCDTC, his fleeting progress in certain areas and his progress before entering OCDTC support the conclusion that he is capable of more than he has achieved during the past six years. A residential program is necessary, at this time, to provide J.C. with the opportunity to develop useful skills which will enhance his ability to function on the most basic level.

Also important in the present case is the implementation of a program to eliminate J.C.'s self-stimulatory behavior. *See Diamond*, 808 F.2d at 991-92 (holding that inability to carry out a behavior modification program may be considered in determining whether residential placement is appropriate). The type of twenty-four hour care needed for an ambulatory child functioning at J.C.'s level to achieve this goal will be found in the structured environment, stability and consistency of a residential facility.[6] *Id.* at 694.

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6. If a corollary of the Court's decision is that J.C.'s parents are assisted in their task of raising J.C. by having him placed in a residential program all the better. This Court does not view the additional benefits which may come from a residential program as grounds for denying such placement.

Appendix B

Plaintiffs seek to have this Court Order J.C.'s placement at the Woods School until he is twenty-one. The Court will order placement at a residential school, but will not designate the particular institution or the duration of the placement. The IDEA requires that a child's IEP be reviewed at least annually. 20 U.S.C. § 1414(a)(5). Moreover, the Court in *Rowley* provided a strong warning to lower courts not to embroil themselves in the specifics of a child's IEP. *Rowley*, 458 U.S. at 206. The importance of flexibility, Dr. Henning's testimony that residential placement is "needed at this time" and the possibility that J.C.'s needs might change, weigh against mandating long term placement in a residential facility. J.C. will continue to undergo the normal evaluation process as set forth under New Jersey law. Should the school district determine, in accordance with this Court's rulings, that J.C.'s needs would be met by day placement, then it would be appropriate for J.C. to return to OCDTC or a similar facility.

With respect to plaintiffs' request for compensatory education, the Court concludes that such relief is inappropriate under the facts of this case. Plaintiffs rely on *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991), in which the school district knew before the child entered the school system that the district would be unable to provide an appropriated education. *Id.* at 873. The decision to permit compensatory education was premised on the district's failure to fulfill what it knew or should have known were its obligations. *Id.* The facts of the present case are easily distinguishable. Defendant provided J.C. with an education which it believed in good faith was appropriate. A difference of opinion as to the adequacy of an educational program is not equivalent to a complete and total failure to provide a child with an education. Therefore, this Court will not grant plaintiffs' motion with respect to this issue.

Appendix B

Conclusion

In light of the foregoing, the Court will enter order judgment in favor of plaintiffs. Plaintiffs' application for compensatory education will be denied. An appropriate Order is filed herewith.

July 31, 1995

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 93-4752 (AET)

M.C. and G.C. on behalf of their son, J.C.,

Plaintiffs,

v.

CENTRAL REGIONAL SCHOOL DISTRICT,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion filed herewith, it is on this 31st day of July 1995

ORDERED that the Administrative Law Judge's decision be and hereby is reversed; and it is further

ORDERED that J.C. be placed in a residential educational facility in accordance with the Opinion filed herewith; and it is further

ORDERED that plaintiffs' request for compensatory education be and hereby is denied.

s/ Anne E. Thompson
ANNE E. THOMPSON, CHIEF JUDGE

APPENDIX C — DISTRICT COURT OPINION DENYING SUMMARY JUDGMENT DATED JULY 1, 1994

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 93-4752 (AET)

M.C. and G.C. on behalf of their son J.C.,

Plaintiff,

v.

CENTRAL REGIONAL SCHOOL DISTRICT,

Defendants.

OPINION

THOMPSON, District Judge

This matter is before the Court on Plaintiffs' motion for partial summary judgement and Defendant's cross motion for summary judgement pursuant to Fed.R.Civ.P. 56(c). For the reasons set forth below, the Court will deny both Plaintiffs' motion and Defendant's cross-motion.

Appendix C

Background and the Proceedings Below

J.C. is a fourteen year old profoundly retarded male. His parents, G.C. and M.C., filed this action appealing the decision of the Honorable Robert W. Scott, Administrative Law Judge ("ALJ") denying J.C.'s parents request to place J.C. in a residential educational facility.

J.C. has been attending the Ocean County Day Training Center ("OCDTC") since 1987 pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, *et seq*. J.C. is classified as eligible for day training under N.J.A.C. 6:28-3.5(d)(6)(ii). During his time at OCDTC, J.C.'s education has been guided by annual Individualized Educational Programs ("IEP") as required under the IDEA. J.C.'s parents have participated in the formulation of those IEPs.

An informal conference was held on July 27, 1992 among a representative of the Division of Developmental Disabilities ("DDD"), M.C. and G.C. At the conference, M.C. and G.C. requested full-time residential placement for J.C. That request was denied by letter dated August 10, 1992. (Plaintiffs' Ex. P-25.)

On August 30, 1992, J.C.'s parents filed a request for full time residential placement with the school district. A triennial evaluation was scheduled and a November 1992 IEP was prepared. The IEP recommended continued placement at OCDTC. (Defendant's Ex. R-4.) M.C. filed a petition for a hearing with the New Jersey State Department of Education on January 13, 1993. The matter was transferred to the Office of Administrative Law for a hearing before Judge Robert W. Scott.

Appendix C

The ALJ conducted hearings on February 16, 17, and 18, 1993, March 8, 1993, and April 14, 1993. On June 16, 1993, the ALJ visited the Ocean County Day Training Center. The ALJ reviewed Plaintiffs' claims that J.C. was not receiving a free and appropriate education under the standard set forth in *Hendrick Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). *See J.C. v. Department of Human Services and Central Regional High School District*, OAL No. EDS 720, Slip Op. at 2-3 (1993). The ALJ concluded that the requirements of *Rowley* are met when "the district provides personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Id.* at 3.

Several witnesses appeared on behalf of the parties. Dr. Booker, Plaintiffs' expert witness was viewed as having the best credentials. However, the ALJ noted that Defendant's witnesses were not only qualified, but had spent more time with J.C. *Id.* at 8.

The ALJ's factual findings consisted primarily of an overview of J.C.'s educational experience at OCDTC. The ALJ explained that J.C. attends class with five to seven students every day for a full day; that there is a teacher and a teacher's aide present at all times and frequently another teacher is present; J.C. is provided with extensive individual and small group instruction; J.C. participates in physical activities; the attention received by J.C. is virtually one on one and significant time is spent on toilet training and eating with utensils. *Id.* at 9-10.

With respect to the benefit conferred by the OCDTC program, the ALJ found that J.C.'s progress had been limited and varied over the last six years. The ALJ further found that J.C. has made progress in preparing himself to toilet, to eat with a spoon and to drink from a cup. *Id.*

Appendix C

Finally, the ALJ found that insufficient evidence was presented to determine J.C.'s potential and in turn whether the progress exhibited by J.C. thus far reflects his abilities. *Id.* at 10.

The ALJ's visit to the OCDTC and the testimony he heard, led him to conclude that J.C.'s parents were no longer able to care for him at home, but that J.C.'s difficulties "go far beyond his educational needs." *Id.* at 10. The ALJ concluded that the extensive problems at home were not the responsibility of Defendant because they were not educational in nature. *Id.* at 10-11.

M.C. and G.C. are appealing the Opinion of the ALJ and seeking to have this Court reverse his Order denying residential placement for J.C. at the Woods School.

Findings of Fact

This Court has reviewed the record on appeal in its entirety. At the outset it is important to note that J.C.'s parents have not formally objected to the IEP which is now before the Court. They have made only informal requests for more communication between the school and J.C.'s home-care provider. Similarly, the need to implement a behavior modification program focusing on J.C.'s self stimulatory behavior was not formally addressed during the formulation of the 1991-1992 IEP. However, the need for a behavior modification program is acknowledged by all parties and it appears that such a program has been crafted. Given the nature of the facility, though, there has been difficulty in implementing the program.

Appendix C

A. J.C.'s Potential

The evidence that J.C. will be able to progress beyond his current level is tenuous. J.C. is severely retarded and is therefore unlike a student who can be taught in a regular classroom or who is able to achieve academic success somewhat comparable to others his age. Some children such as J.C. might be so limited in their ability to progress that the normal measure of benefit required under the IDEA must be adjusted.

Defendant's witnesses have testified that they have achieved some success with J.C., but that his progress has been highly inconsistent. John Budenas, J.C.'s case manager, testified that J.C.'s IEPs contain reasonable goals and objectives taking J.C.'s limitations into account. (Trans 1:252 at 21-1:253 at 16.) Despite Budenas' testimony that the goals were realistic, he admitted that J.C. had not accomplished those goals. (Trans. 1:185 at 11-20.) However, the OCDTC staff who testified before Judge Scott stated that measuring J.C.'s, potential is very difficult because of his profound level of retardation. The achievements which J.C. can be expected to make are measured in very small increments, and his ultimate progress is measured in developmental months rather than years. J.C.'s teacher, principal, social worker and case manager all testified that complete mastery of the goals set forth in an IEP is rarely accomplished. Mastery is viewed as the ultimate achievement for a child whose development is so severely delayed.

Plaintiff's expert witness, Dr. Booker, shed little light on whether J.C. would, with any certainty, be able to progress beyond his current station. Dr. Booker testified that J.C. was capable of making "educational progress . . . beyond the progress that is being made now." (Trans. 3:190 at 8-11; *see also*

Trans. 3:222 at 5-23, 4:32-33, 4:45 at 13-4:46 at 12.) However, Dr. Booker's general assessment must be viewed with caution. When asked to evaluate J.C.'s potential in a specific area he declined stating:

> Well, in assessing that I think that it would be my opinion that that would relate to an evaluation of the plan and his achievement using different techniques, so I wasn't — I wasn't in the position to arrive at that conclusion.

(Transcript 4:73.) Gregory Gowen has for many years been an OCDTC employee, respite care provider for J.C. and substitute teacher for J.C. Gowen testified that "I think from what we've seen and observed that J. has — definitely has potential." (Trans 4:119 at 21-22; *see also* 4:116-120.) Gowen's determination was based on his observations of J.C. during the time they spent together which was often on a one to one basis. The Court notes that Mr. Gowen has no formal training in special education.

A report by Dr. Charles I. Scott, Jr. of the Alfred I. duPont Institute concludes: "This patient has rather profound mental retardation and severe behavior disorders. I feel these are certainly interfering with his educational goals and that he would profit by being in a highly structured, stable residential facility so that he could reach his maximum opportunity for learning." (Plaintiffs' Ex. p-14 at 7.)

The testimony of those qualified individuals who have worked most closely with J.C. strongly suggests that inconsistent progress made in minute steps is the most one can hope to achieve with J.C. Plaintiff's witnesses paint a more

optimistic picture, but have not worked closely with J.C. and their conclusions are educated guesses.

B. J.C.'s Progress

J.C.'s achievements have been highly inconsistent and scattered. In some areas J.C. has even regressed including the frequency with which he independently feeds himself, i.e. regularly versus only when he enjoys the lunch being served. (Plaintiffs' Ex. P-1 at 3, 5 and P-7 at 7.) The ALJ summarized J.C.'s progress by stating that "the program at OCDTC has produced some educational success for J.C." *J.C.*, OAL No. EDS 720, Slip Op. at 11. A careful review of the "Summary Level of Performance" forms dated May 20, 1988, May 23, 1989, May 21, 1991 and May 20, 1992 reveals that some progress has been made in the areas of following verbal commands and maintaining eye contact. Dr. Booker also acknowledged some improvement in the areas of using a fork, drinking from a cup and pulling a chair in and then pushing it out when J.C. sits and stands. (Transcript 3:221.) However, J.C. has made little consistent progress since 1989 in the areas of dressing and undressing himself, toileting and eating with utensils. Although interim reports indicate fleeting instances of progress, no consistent improvement in these areas has been shown. (Plaintiffs' Ex. P-2, P-17 and P-20.)

C. The Need for Residential Placement

Reports by Drs. Booker, Scott and Barabas suggest that residential placement is necessary for J.C. to reach his potential.[1]

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1. The reports submitted by Drs. Scott and Barabas indicate that such placement is required for J.C. to reach his maximum potential. Under *Rowley*

(Cont'd)

(Plaintiffs' Ex. P-10, P-14, P-16.) These reports indicate that as J.C. grows older, stronger and larger, it becomes increasingly difficult for him to receive the home-care he requires in order for him to progress at OCDTC. (*Id.*) J.C.'s teacher, Ms. Trainor, as well as Mr. Budenas, G.C. and Dr. Booker testified that J.C.'s self stimulatory behavior impedes his progress and that intense behavior management and other programs must be implemented during all of J.C.'s waking hours. (Trans 1:199-200, 1:251-252, 3:78 at 1-11, 3:94 at 9-13, 3:122-125, 3:190-191, 3:195-196 at 3, 3:205 at 18-21, 3:208 at 14-19, 3:225 at 24-3:226 at 9, 3:230 at 14-3:231 at 22, 4:73-77, 4:104 at 13-16, 5:133 at 12-19.) Mr. Gowen who worked in the after-school program with J.C. at OCDTC testified that little communication exists between staff of the after school program and the regular OCDTC day program. (4:103 at 18-4:104 at 12.)

Discussion

I. Summary Judgement Standard of Review

A court may enter summary judgement if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish

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(Cont'd)

and its progeny in the Third Circuit, an individual is not entitled to an education which maximizes his/her potential. In certain cases, where a day care setting has provided almost no progress, it appears that conferring a meaningful educational benefit may equate to achieving maximum potential. *See Polk*, 808 F.2d at 992 (citations omitted). However, this Court's evaluation of J.C.'s IEP does not include maximizing J.C.'s potential as a goal.

that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied* 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgement; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not enough to simply show that some "metaphysical" doubt exists as to the material facts. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgement motion. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

In deciding a motion for summary judgement, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. It is in this light that the Court must undertake an analysis of the facts of this case.

II. Review of an Administrative Law Judge's Decision Under the IDEA

A district court reviewing the decision of an ALJ "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415

(e)(2). The decision of the district court must be an "independent determination based on a preponderance of the evidence." *Geis v. Bd. of Educ.*, 774 F.2d 575, 583 (3d Cir. 1985). The amount of deference to be given the administrative proceedings is a matter left to the discretion of the district court. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218 (3d Cir. 1993) (citing *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988)). The ALJ's findings of fact must be considered, but may be accepted or rejected by the reviewing court. *Id.* Due weight must be given to the administrative proceedings, not, however, to the prevailing party. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982); *Oberti*, 995 F.2d at 1218 (1993). The Third Circuit has concluded that the burden of proof does not shift from those who originally bore it at the administrative level. *Oberti*, 995 F.2d at 1218-19. Defendant, therefore, retains its burden of proof in the instant action to prove that J.C.'s IEP is appropriate. *Id.* at 1218.

III. Standard for Determining the Adequacy of Progress

The Supreme Court in *Rowley* held that the basic floor of opportunity will be met when a child receives "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 201-03. The Court limited its holding by explaining that varying degrees of disability and the individual needs of each child make it difficult to establish "one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. The Third Circuit has interpreted *Rowley* on at least two occasions. *See Polk v. Central Susquehana Intermediate Unit 16*, 853 F.2d 11 (3d Cir. 1988) *cert. denied*, 488 U.S. 1030 (1989) and *Bd. of Educ. of E. Windsor Regional School District v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986). In both *Polk* and *Diamond*, the Third Circuit concluded that an

appropriate IEP will result in more than *de minimis* benefits. *Polk*, 853 F.2d at 172 and *Diamond*, 808 F.2d at 991. The plan for a severely handicapped student such as J.C. will satisfy the requirements of the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement." *Diamond*, 808 F.2d at 991. The benefit to the disabled student must be meaningful, "more than mere access to the schoolhouse door." *Polk*, 853 F.2d at 182.

The IEP is at the core of IDEA. *Rowley*, 458 U.S. at 182; *Polk*, 853 F.2d at 173. The IEP sets forth the goals and objectives which will be used to determine whether the child is receiving a free and appropriate education as required by the IDEA. 20 U.S.C. § 1401(a)(20); *Lascari v. Board of Education*, 116 N.J. 30, 48 (1989).[2] The issue before the Court is whether the services received by J.C. and the progress achieved by J.C. meet the requirements of the IDEA.

Based solely on the record submitted, the Court is unable to grant either Plaintiffs' or Defendant's summary judgement motion. While J.C.'s growth may appear to be *de minimis* for a less disabled student, it may actually be meaningful given J.C.'s delayed development. Moreover, limited growth in some areas may be a reflection of J.C.'s ultimate potential. The evidence currently before the Court presents conflicting views of J.C.'s potential, abilities and the adequacy of the program at OCDTC. For example, the evidence is ambiguous with respect to whether

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2. Plaintiff argues that New Jersey has a higher standard for the educational benefit which must be conferred under its IDEA counterpart, N.J.A.C. 6:28-1.1. Based on the language contained in that statute and on *Lascari v. Board of Education*, 116 N.J. 30, 48 (1989), this Court concludes that New Jersey uses the federal standard.

Appendix C

J.C.'s self-stimulatory behavior can be eliminated or decreased and what effect residential placement would have in achieving that goal. Also inconclusive is the evidence regarding J.C.'s toileting skills and abilities and the necessity of residential placement for his progress in that area. Hence this Court concludes that it must conduct an evidentiary hearing. The motions for summary judgement will be denied.

Conclusion

In light of the foregoing, the Court will deny Plaintiffs' and Defendants' motions for summary judgement. An appropriate Order is filed herewith.

July 1, 1994.

APPENDIX D — DECISION OF ADMINISTRATIVE LAW JUDGE DATED SEPTEMBER 10, 1993

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDS 720-93
AGENCY DKT. NO. 93-5131

J.C.,

Petitioner,

v.

DEPARTMENT OF HUMAN SERVICES AND CENTRAL REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

DECISION

Linda J. Robinson, Esq., on behalf of the petitioner (Herbert D. Hinkle, attorney)

Richard J. Kaplow, Esq., on behalf of the respondent (Weinberg and Kaplow, attorneys)

Record Closed: July 27, 1993 Decided: September 10, 1993

BEFORE **ROBERT W. SCOTT**, ALJ:

Appendix D

PROCEDURAL HISTORY

This case arises out of the Individuals With Disabilities Education Act (IDEA), 20 *U.S.C.A.* 1401-1485 and *N.J.S.A.* 18A:46-1 to 46-41. On January 13, 1993, J.C.'s parents filed a Petition with the Department of Education. Pursuant to *N.J.S.C.* 6:28-2.7(e)(4), a settlement conference was held on January 25, 1993. Following the settlement conference the Commissioner of Education requested that an administrative law judge be assigned to conduct a hearing pursuant to 20 *U.S.C.* § 1415 and 34 *C.F.R.* § 300.509 to 300.587.

This matter was transmitted to the Office of Administrative Law on January 29, 1993 and at that time the Central Regional District and the Department of Human Services were respondents. During the course of the proceedings the Department of Human Services was allowed to withdrawal as a respondent. At the request of the remaining parties hearing dates were scheduled for February 9, 16, 17, 18, 26, 1993; March 8, 17, 31, 1993; April 14, 1993; May 6, 1993 and June 16, 1993. At the request of the parties the following hearing dates were adjourned: February 9, 26 and March 17, 1993. The date of March 31, 1993, was used to take the deposition of Jennifer Walz. On June 16, 1993, the undersigned visited the Ocean County Day Center at the request of the parties. Both parties requested an opportunity to submit post-hearing briefs and agreed to submit the same by July 26, 1993. The record was closed on July 27, 1993, when the undersigned received both post-hearing submissions from the parties.

Appendix D

STATEMENT OF THE CASE

This matter involves the education placement of J.C., a fourteen year old male special education student residing in Bayville, New Jersey and the Central Regional School District. J.C. has been classified as eligible for day training and this is not disputed by the parties. J.C. was classified eligible for day training in April of 1984. On June 29, 1987, he was placed in the Ocean County Day Training Center (OCDTC). The parents of J.C. now challenge the appropriateness of this placement.

APPLICABLE LAW

New Jersey receives federal funding under IDEA, a statute enacted to assist states with the education of disabled children. IDEA provides that states must assure all children with disabilities the right to a free appropriate education. New Jersey law also has similar protections for disabled children (*N.J.S.A.* 18A-46-1 to 85). *N.J.A.C.* 6:28-2.1(a) requires school districts to provide a free appropriate public education program and related services for handicapped children in the least restrictive environment. In disputes over the appropriateness of the education program of a handicapped child, the school district bears the burden of demonstrating that the program is appropriate. Further, the United States Supreme Court has expanded the burden upon the school district by including the requirements that the educational program must be sufficient to confer some educational benefit. (See, *Hendrick Hudson Central School District v. Rowley,* 458 *U.S.* 176 (1982). The standard for a free appropriate public education which confers some educational benefit is met when the district provides personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.

Appendix D

DISCUSSION

J.C. is a fourteen year old boy who has been severely developmentally disabled since birth. He has multiple disabilities including profound mental retardation and neurological impairment. He is non-verbal and he is easily distracted and engages in self-stimulatory behaviors. He can not feed himself and he is not toilet trained. He will stick any object into his mouth. He is educationally handicapped and has been classified as eligible for day training. His educational needs include but go far beyond communication, self-help, mobility and behavior.

Consistent with the classification of eligible for day training, J.C. demonstrates profound retardation. His performance and behavior are profoundly below his age group and he is consistently incapable of giving any evidence of understanding and responding in a positive manner to simple directions even expressed in his primary mode of communication. He can not in some manner express his basic wants and needs. He fully fits into the definition of eligible for day training as set forth in *N.J.A.C.* 6:28-3.5(d)(6)(iii).

Since June of 1987, J.C. has been placed at the Ocean County Day Training Center (OCDTC), an education facility run under the direction and control of the New Jersey Department of Human Services. This facility was designed to meet the educational needs of students classified as eligible for day training. In addition J.C. receives related services from the Division of Developmental Disabilities (DDD) also a Division of the Department of Human Services. In early 1992, J.C.'s parents challenged a decision of DDD that placed J.C. on a waiting list for community placement. A full time residential

placement was sought. On August 10, 1992, DDD denied J.C. residential placement and continued him on the waiting list for community placement.

In September of 1992, J.C.'s parents requested that the respondent place J.C. in a full time residential educational facility. Eventually this dispute was transmitted to the Office of Administrative Law as set forth in the above procedural history.

POSITION OF THE RESPONDENT

As indicated above, the respondent has the burden of showing that J.C.'s educational placement is appropriate. That is why the undersigned has considered the respondent's position first in this decision.

During the course of the hearing Mr. Budenas testified for the respondent. Budenas is J.C.'s case manager and he is a certified learning disabilities teacher consultant. Budenas reviewed J.C.'s individualized educational program (IEP) for the 1992-93 school year. The IEP called for extensive individual and small group instruction in toileting, personal hygiene, and eating with the use of utensils. The IEP also called for summer instruction in pre-vocational and domestic activities, recreation, music and art. According to Budenas, J.C. receives at OCDTC, speech therapy three times a week, adoptive physical therapy one time a week, occupational therapy two times a week and physical therapy when required. J.C. attends OCDTC twelve months in what is referred to as an extended school year. In addition, J.C. participates in activities which include horseback riding, swimming and trips to community locations such as shopping malls. After school J.C. and his parents receive home and respite care provided by DDD. At the end of each school year,

in the spring or early summer, the IEP is reviewed with the child study team and J.C.'s parents and prior to June of 1992, according to Mr. Budenas, J.C.'s parents never indicated any problem with the appropriateness of J.C.'s placement at OCDTC. Budenas was of the opinion that the goals and objectives of J.C.'s IEP were educationally appropriate and that his placement at OCDTC was appropriate.

School Social Worker McLaughlin also testified for the respondent. It was her testimony that she evaluated J.C. in October of 1992 and she had concluded that J.C. had made some gains in self-help and social skills. In observing J.C., she saw no evidence of aggression or self-injurious behavior. She found that J.C. had profound deficiencies and she thought the IEP should challenge J.C. more. She also thought that reinforcement should be attempted at home with the assistance of respite workers. She found no evidence that J.C. had plateaued in his learned skills and she found the IEP and the placement at OCDTC appropriate.

It was the testimony of Administrator and Principal Colin of OCDTC that J.C.'s behavior impacted upon his educational progress and that this was not unusual in light of his profound retardation and proficiencies.

The last witness for the respondent was Ms. Trainor, J.C.'s teacher of the last three years. She described J.C.'s self-stimulatory behavior as challenging and she testified that he required considerable attention in class. She sought the help of a behavioral expert in trying to correct J.C.'s self-stimulating behavior. It was her opinion that J.C. has made progress in toilet training and eating skills. She did acknowledge however that training at home in these areas was also essential if J.C. was to continue to progress.

Appendix D

RESPONDENT'S LEGAL POSITION

The respondent basically agrees with the principles of law previously stated in this opinion. However, the respondent argues further that the standard of review in special education matters is whether the program offered to a student is sufficient to confer some educational benefit. *Lascari v. BOE,* 116 *N.J.* 30 (1989). The respondent feels that the requirements of IDEA are met when to the extent appropriate children with disabilities are included in regular classroom settings as close to home as possible. This type of placement maximizes the opportunity for mainstreaming and inclusion of a handicapped child in a regular school setting. In other words, the respondent's position is that if the program is reasonably calculated to confer some educational benefits and is an inclusive educational program within the least restrictive environment the respondent has met the requirements of the IDEA.

PETITIONER'S POSITION

As stated above, the petitioner's position has been stated last because the burden is upon the respondent to show that the educational program being considered in this matter is appropriate for the petitioner. The petitioner's position however, as to the facts and the program are quite different. It is argued in behalf of the petitioner, J.C., that he has failed to make any educational progress in OCDTC for the six years that he has been there. The petitioner points to evidence concerning toilet training which shows that in 1988, J.C. was toilet trained with few accidents. In May of 1992, it was stated that he rarely had accidents. However, in 1993, J.C.'s IEP still called for time toilet training and a toilet training chart for January showed that he had several accident during one week.

Appendix D

The petitioner shows that in the IEP for 1989 a goal for J.C. was to pull his pants down on request. In February, 1989 evidence showed that J.C. was pulling his pants down with moderate assistance. Later that year he was doing "nicely" in pulling his pants up and down during toilet time. However, a recent report of February of 1993, shows that J.C. is only having moderate success in being able to pull his pants up and down during toileting.

It was argued further that a review of progress reports during the six years that the petitioner J.C. had been at OCDTC shows little change in his ability to accomplish certain activities. This is demonstrated in the progress reports in the area of physical education where J.C.'s bowling ability has changed little over the last three years. This is shown in the progress reports where his communication skills indicating what he wants have changed little since 1989.

It is also argued that the petitioner's self-stimulating behaviors have not changed drastically during the six years he has been at OCDTC. He still chews his clothing and he still places just about any object he can find in his mouth. It is pointed out that it took J.C.'s teacher Ms. Trainor almost two and one-half years before she sought an expert in helping with the above behavior. Further it is argued that even after a program was developed there was no evidence offered by the respondent that the program had been implemented to improve the petitioner's behavior. (Petitioner's counsel did not find Ms. Trainor's testimony as to this point convincing).

It is argued that the petitioner's IEP is deficient because it doesn't specifically mention a behavior management plan. Witnesses for the petitioner testified as to this deficiency during

the course of the hearing. This is surprising since Ms. Trainor testified that J.C.'s self-stimulatory behaviors had impeded his educational progress.

In support of these positions for the petitioner J.C., petitioner's counsel pointed to the evidence presented in the petitioner's behalf. That testimony came from Dr. Booker, a psychologist, from the testimony of people who had worked with J.C. and from J.C.'s parents.

To summarize Dr. Booker's testimony, it was his opinion that during the six years that J.C. has been at OCDTC, he should have progressed more and he was capable of progressing more than he had in all the skills described. Dr. Booker was also positive that J.C. abilities and progress could be adequately tested and demonstrated. It was his opinion that J.C. was not appropriately placed at OCDTC. In Dr. Booker's opinion, a more appropriate placement would be the Woods School in Pennsylvania. Dr. Booker also did not agree, at least to the extent testified to by witnesses for the respondent, that J.C. would normally show inconsistent progress or some regression in the skills attempted or learned in an appropriate educational placement.

All the other witnesses for the petitioner, and especially the testimony of the petitioner's parents, established the need for constant supervision to prevent J.C. from eating objects and engaging in other self-stimulatory behavior. They testified to the need for placing J.C. in a room which was basically empty and bare to protect him from hurting himself. They testified as to J.C.'s toilet training problems and his inability to feed himself. According to these witnesses there had been little improvement during the six years J.C. has been at OCDTC.

Appendix D

PETITIONER'S LEGAL ARGUMENT

In addition to the applicable law stated by the undersigned above and the legal position taken by the respondent, the petitioner argues that an appropriate educational program for the petitioner must be tailored to meet the unique needs of a handicapped child. *Hendrick Hudson District BOE v. Rowley,* 458 *U.S.* 176 (1982). The petitioner argues further that New Jersey law requires an educational program best to achieve success in learning. *BOE East Windsor Regional School District v. Diamond,* 808 Fed. 2nd. 987 (3rd Cir. 1986). The petitioner goes further, stating that this case holds that a school district must show that an educational program is likely to produce educational success.

The petitioner also cites 20 *U.S.C.* § 1401(a)(20)(f) as progress requirements for handicapped children to be measured by the achievement of goals and objections established by the IEP. Arguing further that if the goals and objective set forth are not met or achieved than there has been a lack of meaningful educational progress.

The petitioner argues that residential placement must be provided when it is needed in order to meet the child's individual educational needs. To determine whether residential placement is appropriate, the undersigned should analyze whether full time placement may be considered necessary for educational purposes or whether the residential placement is a response to medical, social or emotional problems which are segregable from the learning process. *Kruelle v. New Castle County School District,* 642 Fed. 2nd. 587 (3rd Cir. 1981).

Appendix D

OBSERVATIONS OF THE UNDERSIGNED

In reviewing the evidence in this matter, the undersigned feels compelled to make some observations concerning the same. Dr. Booker, who testified for the petitioner, appeared to have the best credentials as an expert witness. However, all the witnesses for the respondent were qualified both educationally and through experience to give competent opinion testimony. Further, most of the witnesses for the respondent had spent far more time with the petitioner J.C. and his educational progress.

After hearing all the witnesses testimony, and especially the testimony of J.C.'s parents, it was overwhelmingly evident to the undersigned that the parents of J.C. are no longer in a position to "handle" J.C. while he is at home. This became even more evident after the undersigned visited the OCDTC.

As stated above, the facility was visited by the undersigned on June 16, 1993. Though Mrs. Colin knew the undersigned would be visiting the center on that date, I arrived much later than expected. I was met by Mrs. Colin's assistant and she led me through all the classrooms of the center with little discussion other than answering specific questions presented by myself. In each classroom, I observed five or six students, a teacher, a teacher's aide and a teacher of a specialized subject. Though I did not know it at the time, I observed the petitioner J.C. in his classroom. After the entire visit was over I asked if I had seen the petitioner and I was told that I had. I recalled meeting J.C.

Appendix D

FINDINGS OF FACT

Based upon the evidence before me and the inferences that can be reasonably drawn from that evidence, I **FIND** that the petitioner J.C. is educationally classified as eligible for day training. For the last six years the petitioner has been attending the OCDTC. In New Jersey, students that are classified eligible for day training and who are not placed in residential facilities are normally placed in county day training centers similar to OCDTC. It would appear that the policy of this State has been that the local Board of Education cannot maintain educational programs for eligible for day training students and the Department of Human Services has set up day training centers in each of our counties for this purpose.

I further **FIND** that the petitioner J.C. attends OCDTC daily for a full day program throughout the entire year in what we refer to as an extended school program. His class consists of five to seven students similarly classified. Approximately half of the students are non-ambulatory. At a minimum there is a teacher and a teacher's aide present at all times, and normally there is also another teacher present who is trained in a specialized subject. The attention applied to each student is almost on a one-to-one basis.

I further **FIND** that the educational program of J.C. consists of basic skills and functions. J.C. is severely retarded and his educational requirements are for the ability to feed himself, to toilet himself, and other very basic skills. During the last six years there is no question that his progress in toileting and eating skills has been limited and his progress has varied. However, there is insufficient evidence that a child with J.C.'s ability is capable of more and there is insufficient evidence that J.C.'s potential can be adequately measured.

Appendix D

I further **FIND** that the educational program offered at OCDTC provides J.C. with extensive individual and small group instruction in areas of toileting, personal hygiene and eating. He receives instruction in pre-vocational and domestic activities. He also receives time for recreation, music and art. He receives speech therapy three times a week. He participates in physical activities such as horseback riding and swimming. The attention provided to him while he is at OCDTC is basically one on one because he is a very active child.

I further **FIND** that the parents of J.C., due to his age, size and activity, are no longer capable of taking care of this child while he is at home. Not only does he require extensive attention but he also needs someone trained to deal with a special child like the petitioner. However, these needs go far beyond his educational needs.

I further **FIND** that the educational program at OCDTC is tailored to the needs of the petitioner. Significant time is spent on toilet training, eating with a spoon, drinking with a cup, keeping things out of the mouth, etc. The program may not be the "best," but it can and has shown that it can achieve some success with J.C.'s needs. There is insufficient evidence as to what is the "best" educational program for J.C.

I further **FIND** that the educational program at OCDTC has produced some educational success for J.C. At times his ability in preparing himself to toilet has improved. So has his ability to eat with a spoon and drink from a cup.

I further **FIND** that the education program at OCDTC has followed the goals and objectives of J.C.'s IEP. Meeting these goals depends on J.C.'s ability and how that ability can be

measured. A lack of creditable evidence prevents a finding on J.C.'s's ability and eventual progress.

CONCLUSION

I CONCLUDE that the educational program offered by the respondent is an appropriate educational placement in the least restrictive environment for the petitioner J.C. Like non-handicapped children, he lives at home, takes a school bus to school and attends a school not far from home. The educational program given the petitioner at OCDTC meets the requirements of his IEP and meets his educational needs, generally. Both the respondent and OCDTC are staffed with trained and certified teachers and the program offered is reasonably calculated to confer educational benefit upon J.C. and the other students attending OCDTC. I therefore **DENY** the petitioner's request that the respondent place the petitioner J.C. in the Woods School.

I am sure it is obvious from reading the above that even though the undersigned does not feel that the respondent should be responsible for residentially placing the petitioner, J.C., it is clear from the evidence that the parents of this child need help when he is not in school. Though the issue is not before me, it is quite clear that J.C. may be eligible for other residential placement through DDD. The undersigned is not aware of the standard used by DDD for community placement and residential placement. However, this avenue should be fully explored by the petitioner. J.C. may very well need residential placement for medical, social and emotional problems which are separate from his education needs.

This decision is final pursuant to 20 *U.S.C.* § 1415(e)(2) and 34 *C.F.R.* § 300.509 and 511 (1986) and is appealable by filing a

complaint and bringing an action either in the Superior Court of New Jersey or in a District Court of the United States. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education, New Jersey Department of Education.

Sept 10, 1993
DATE

s/ Robert W. Scott
ROBERT W. SCOTT, ALI

Appendix D

EXHIBITS

On behalf of the Petitioner:

P-1 IEP dated May 24, 1988

P-2 Progress Report, November 1991 to January 1992

P-3 Client Activity Reports dated December 18, 1992 and December 20, 1992

P-4 Behavior Plan undated and unsigned

P-5 Trainor's document to behavior modification specification dated March 5, 1992

P-6 Three faculty charts dated January 18, 1993, January 25, 1993 and February 1, 1993

P-7 Petitioner's IEP for 1989

P-8 Petitioner's IEP for 1990

P-9 Dr. Booker's resume

P-10 Dr. Booker's report

P-11 IEP Meeting Report, June 1, 1989

P-12 Child Study Team (CST) minutes dated March 15, 1990

Appendix D

P-13 A paper towel with black mark

P-14 Scott and Nicholson Report dated April 8, 1992

P-15 Dr. Barabas' Report Dated June 20, 1992

P-16 Dr. Haimowitz's Report

P-17 Progress Report, February 1990

P-18 Progress Report, January 1991

P-19 Progress Report, November 1991

P-20 Progress Report, February 1993

P-21 Mrs. C.'s letter dated March 22, 1993

P-22 Letter of Christine Stibler Dated June 29, 1992

P-23 Letter of Nurse Weiss Dated July 24, 1992

P-24 DDD letter dated June 10, 1992

P-25 DDD letter dated August 10, 1992

P-26 Woods' School Brochure

P-27 Woods' School Green Booklet

P-28 Letter from Woods' School dated December 14, 1992

Appendix D

P-29 Client Survey dated May 22, 1992

On behalf of the Respondent:

R-1 IEP Annual Review, May 3, 1991

R-2 IEP Annual Review, May 20, 1992

R-3 Letter dated August 30, 1992 from the C.'s

R-4 IEP and Reevaluation 1991

R-5 Educational Assessment dated November 10, 1992

R-6 Social Work Evaluation dated October 19, 1992

R-7 (Not admitted) Vineland Adoptive Behavior Scale Revised

R-8 Progress Report, November 1990 to January 1991

R-9 Progress Report, August 1991 to October 1991

R-10 Progress Report, August 1992 to October 1992

R-11 Report of Dr. Misliv dated October 28, 1992

R-12 McGowan Report

R-13 Client Activity Report dated January 4, 1993

Appendix D

WITNESSES

On behalf of the Petitioner:

Paul Booker, Licensed Psychologist
Gregory Gowen, Teacher Aide OCDTC
M.J.C., Petitioner's father
G.C., Petitioner's stepmother
Jennifer Walz, Respite Provider (By deposition)

On behalf of the Respondent:

John Budenas, Learning Disability Teacher-Consultant
Kyle McLaughlin, School Social Worker
Joanne Colon, Principal, Ocean County Day Training Center (OCDTC)
Susan Trainor, Teacher OCDTC

Supreme Court, U. S.
FILED
AUG 19 1996
CLERK

No. 96-97

In The

Supreme Court of the United States

October Term, 1995

CENTRAL REGIONAL SCHOOL DISTRICT,

Petitioner,

vs.

M.C. AND G.C. on behalf of their son, J.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is a split of authority within the federal circuits with regard to the applicable standard for an award of compensatory education beyond the age of twenty-one to a handicapped student under the Individuals with Disabilities Education Act.

II. Whether the standard established by the Third Circuit to determine a court award of compensatory education should stand, where it is consistent with prior decisions of this Court and where adoption of a "gross deprivation" or "bad faith" standard would create an unfair disparity between the relief available to parents who can afford to fund appropriate placements for their children pending the outcome of litigation and the relief available to those parents who are financially unable to enroll their children in private schools and must, instead, seek compensatory education.

III. Whether this Court should review the valid factual findings of the District Court, as affirmed by the Third Circuit.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Counter Statement of the Case 1

Reasons for Denying the Writ 2

I. Neither the Second Circuit nor any other circuit has established a rule requiring a demonstration of "gross deprivation" or "bad faith" by a school district to support an award of compensatory education beyond the age of twenty-one to a student under the IDEA. 3

II. Central Regional's petition should be denied because the standard created is consistent with previous decisions of this Court and properly treats all claimants equally under IDEA. 8

III. This Court should not review the valid and proper factual findings of the District of New Jersey, as affirmed by the Third Circuit. 12

Conclusion 13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Burlington v. Department of Education, 471 U.S. 359 (1985) 8, 10, 11

Burr by Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988) .. 4, 5, 6

Florence County v. Carter, 126 L. Ed. 2d 284 (1993) ... 8, 11

Garro v. Connecticut, 23 F.3d 734 (2d Cir. 1994) 5

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 13

Harris v. District of Columbia, 1992 U.S. Dist. Lexis 11831 (D.D.C.) 9, 10

Jefferson County Bd. of Education v. Breen, 853 F.2d 853 (11th Cir. 1988) 6

Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991) 8

Manchester School District v. Christopher B, 807 F. Supp. 860 (D.N.H. 1992) 10

McManus v. Wilmette School District, 1992 U.S. Dist. Lexis 18167 (N.D. Ill.) 10

Contents

Page

Melvin v. Bolton School District, 1996 U.S. App. LEXIS 2905 (2d Cir. 1996) 6

Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) 7, 9

Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990) 5

Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936) 12

Pihl v. Massachusetts, 9 F.3d 184 (1st Cir. 1990) 7

Straube v. Florida Union, 801 F. Supp. 1164 (S.D.N.Y. 1992) 5

Stuart v. Hayden, 169 U.S. 1 (1898) 12

Todd v. Andrews, 933 F.2d 1576 (11th Cir. 1991) 7

Rule Cited:

Supreme Court Rule 15.1 1

Other Authorities Cited:

N.J.A.C. 6:28-3.5(6)iii 1

N.J.A.C. 6:28-4.2 1

Moore's Federal Practice, ¶ 52.12 12

Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995) 6

Contents

Page

APPENDIX

Appendix A — Opinion and Order in *Melvin et al. v. Town of Bolton School District, et al.* 1a

COUNTER STATEMENT OF THE CASE

The opinion of the Court of Appeals sets forth the facts of this case and in the interest of brevity, J.C. respectfully directs the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1 J.C. notes the following misstatements of facts contained in the petition.

Contrary to Central Regional School District's (hereinafter "Central Regional") repeated assertions, although J.C. is classified as "Eligible for Day Training," this does not mean that there has been a finding that he is profoundly mentally retarded. (Petition at 1-2). Rather, New Jersey considers a child such as J.C. "Eligible for Day Training" if he is *functioning* profoundly below age expectations in the designated areas, regardless of what his intellectual potential may be. N.J.A.C. 6:28-3.5(6)iii.

Central Regional also erroneously states that New Jersey anticipates that all students classified as "Eligible for Day Training" will be placed in a day training center. (Petition at 2). In accordance with IDEA's requirements, New Jersey provides a continuum of alternative placements to meet the needs of all of its handicapped students, of which a day training center is only one option. *See* N.J.A.C. 6:28-4.2.

Central Regional falsely states that throughout these proceedings, "it has been uniformly recognized that J.C.'s extremely low levels of functioning have precluded his educators from being able to demonstrate an objectively measurable quantum of progress from one academic year to the next." (Petition at 9). As is clear from the District Court's opinion, J.C.'s expert, Dr. Dana Henning, testified that in an appropriate placement J.C. would make measurable progress. (Appendix 30a-33a, 36a- 39a).

Further, Central Regional misrepresents that there is no evidence in the record upon which to conclude that J.C. had "untapped potential" or that there is an educational program or intervention that could produce a greater quantum of progress for J.C. than he had experienced at Ocean County Day Training Center.[1] (Petition at 7-8, 10). There was considerable evidence in the record, including the testimony of Dr. Henning and J.C.'s school records, that showed that he had made significant progress before being placed at Ocean County Day Training Center. (Appendix 30a). The District Court accepted Dr. Henning's expert opinion that it was the inappropriateness of his day placement that had resulted in only fleeting progress and regression and that J.C. would progress if placed in an appropriate residential school. (Appendix 30a-33a, 36a-37a).

Finally, Central Regional mistakenly states that J.C. is a fourteen-year-old student. (Petition at 1). J.C. was fourteen years of age when his parents first filed for administrative due process in January 1993. He is now seventeen years of age.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because no conflict exists among the federal circuits with regard to the legal standard to be applied when considering a handicapped student's IDEA claim for compensatory education beyond the age of twenty-one. Neither the Second Circuit nor any other circuit has adopted a "gross deprivation" or "bad faith" standard for compensatory education claims. Therefore, the Third Circuit ruling does not

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1. The District Court initially denied J.C.'s motion for summary judgment because it found that the "evidence that J.C. will be able to progress beyond his current level is tenuous." (Appendix 45a). After conducting an evidentiary hearing and in light of Dr. Henning's testimony, the District Court found as a factual matter that J.C.'s lack of progress and even regression in some areas was due to an inappropriate placement. (Appendix 36a-38a).

create a conflict among the circuits requiring resolution by this Court.

The Third Circuit decision is consistent with previous decisions of this Court and should be upheld as a logical means of enforcing the IDEA's guarantee of a "free appropriate education." A reversal of the Third Circuit ruling will create an inequitable disparity between parents who can afford to place their child in an appropriate placement pending the outcome of litigation and then seek reimbursement and parents who cannot advance the cost of an appropriate education but instead must seek compensatory education.

The Circuit Court's decision is based on the proper and fully substantiated factual findings of the District Court. Here, there is no question of law at issue that justifies the grant of a Petition for a Writ of Certiorari.

I.

NEITHER THE SECOND CIRCUIT NOR ANY OTHER CIRCUIT HAS ESTABLISHED A RULE REQUIRING A DEMONSTRATION OF "GROSS DEPRIVATION" OR "BAD FAITH" BY A SCHOOL DISTRICT TO SUPPORT AN AWARD OF COMPENSATORY EDUCATION BEYOND THE AGE OF TWENTY-ONE TO A STUDENT UNDER THE IDEA.

There is no split of authority within the federal circuits with regard to the applicable standard for an award of compensatory education beyond the age of twenty-one. Accordingly, there is no need for this Court to resolve the issue of the appropriate compensatory education standard. Notwithstanding the assertions of Central Regional, the published decisions of the circuit courts of appeals dealing with the compensatory

education issue do not require either "gross deprivation" or "bad faith." While there may arguably have been bad faith or gross procedural violations by the school districts in the cases cited by Central Regional, none of the courts have adopted a standard which holds that "gross deprivation" or "bad faith" is a prerequisite to an award of compensatory education.

Despite passing references in case law, there is no prevailing Second Circuit compensatory education standard which is at odds with the Third Circuit standard. The three Second Circuit cases which Central Regional asserts require a student to show "gross deprivation" in order to be entitled to compensatory education all involved the school districts' violation of procedural requirements. This case, in contrast, concerns Central Regional's substantive failure to provide J.C. with an appropriate education. Although the court in these three cases did refer to "gross procedural violations", it seemed to be using the term "gross" to exclude *de minimis* infractions of the procedural requirements. The Second Circuit did not establish a standard requiring "gross procedural violations" in any of these cases. Moreover, even if the court had established this standard for procedural violations, it did not even hint that "gross violations" would also be required where the school district had deprived the child of his/her substantive right to an appropriate education.

In *Burr by Burr v. Ambach*, 863 F.2d 1071, 1075 (2d Cir. 1988), cited by Central Regional as a case setting forth the "gross deprivation" standard, the school district's undue delay in conducting an agency hearing and in the administrative review of that decision was found to have violated IDEA's procedural requirements that a hearing decision be made within 45 days. In awarding one and a half years of compensatory education to make up for the educational time the student had lost while the case was being litigated, the Second Circuit noted, "[o]bviously,

the federal regulations were grossly violated in this case" by the delays in deciding plaintiff's case. The court, however, did not hold that gross deprivation by a school district was a prerequisite to an award of compensatory education or even state that its award of compensatory education was premised on the fact that the violation of procedural requirements was "gross." *Id.*

Similarly, although the court in *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) observed that the school district had "grossly violated" procedural requirements and that the student was entitled to compensatory education, it did not set a standard requiring "gross deprivation" or even refer in passing to what would be required if the child had been substantively deprived of an appropriate education.

In *Garro v. Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994), the remaining Second Circuit Court of Appeals cited by Central Regional, the plaintiff alleged that the school district failed to comply with procedural requirements. However, the student in *Garro* did not even meet the eligibility requirements for special education, and the alleged procedural violations by the school district were "unspecified." *Id.* at 734. In those circumstances, the Second Circuit upheld the dismissal of Garro's claim for compensatory education. Again, the court did not set a standard requiring "gross deprivation" as a prerequisite to awarding compensatory education.

The absence of a "gross deprivation" standard within the Second Circuit is further evidenced by recent decisions in that Circuit awarding compensatory education where a handicapped student was substantively deprived of an appropriate education without first finding "gross deprivation" or "bad faith" by the school district. In *Straube v. Florida Union*, 801 F. Supp. 1164 (S.D.N.Y. 1992), for example, the court found that a student had been deprived of an appropriate education and awarded one year

of compensatory education, without any reference to a "gross deprivation" standard.

Melvin v. Bolton School District, 1996 U.S. App. LEXIS 2905 (2d Cir. 1996), also illustrates the absence of a "gross deprivation" or "bad faith" standard within the Second Circuit. In *Melvin*, the Second Circuit affirmed the award of three years of compensatory education beyond Melvin's twenty-second birthday for substantially the reasons stated in the Magistrate's Opinion and Order. Neither the Second Circuit nor the Magistrate's Opinion referred to any supposed "gross deprivation" standard or found that the school district had "grossly deprived" the student of her rights. (*See* Appendix, *infra*, 1a-11a). Further, although the Second Circuit in *Melvin* referred to its earlier decision in *Burr by Burr v. Ambach, supra*, it relied upon it only for the proposition that a court was authorized to grant "appropriate relief" or any "relief designed to ensure that the student is appropriately educated within the meaning of IDEA." *Id.*

As the above case law illustrates, there is no "gross deprivation" standard for an award of compensatory education within the Second Circuit. Similarly, no other circuit requires a showing of "gross deprivation" or "bad faith" as contended by Central Regional. *See* Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995) (maintaining that, in general, the prerequisite of a compensatory education award is a simple finding that a child has received an inappropriate education).

In *Jefferson County Bd. of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988), cited by Central Regional, the Eleventh Circuit merely noted that compensatory education should be a deterrent to the unnecessary prolonging of litigation. *Breen* did not adopt a "gross deprivation" or "bad faith" standard and the

court made no finding that the Board's actions grossly deprived the student of a free appropriate education or evidenced bad faith. *See also Todd v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991) (holding that compensatory education is appropriate relief where responsible authorities have failed to provide a disabled student with an appropriate education).

Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) also fails to support the proposition that a handicapped student must show bad faith by the school district before being awarded compensatory education. In *Miener*, the Eighth Circuit held:

> Accordingly, we hold that the Plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the EHA.

Id. at 754. *See also Pihl v. Massachusetts*, 9 F.3d 184, 190 (1st Cir. 1990) (holding that Plaintiff may claim relief in the form of compensatory education if he can prove that the school district denied him his right to a free appropriate education).

Thus, the Eleventh, Eighth and First Circuits, and now the Third Circuit, merely require a finding that the school district has denied a student a free appropriate education; no "gross deprivation" or "bad faith" is required. Accordingly, because there is no "gross deprivation" standard within the Second Circuit and because no other Court of Appeals has enunciated or followed a "gross deprivation" or "bad faith" standard, there is no conflict among the Circuits requiring resolution by this Court. Central Regional's petition for a Writ of Certiorari should therefore be denied.

II.

CENTRAL REGIONAL'S PETITION SHOULD BE DENIED BECAUSE THE STANDARD CREATED IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT AND PROPERLY TREATS ALL CLAIMANTS EQUALLY UNDER IDEA.

In this case, the Third Circuit held that a child's right to compensatory education accrues from the point that the school district knows or should know that the child's Individualized Education Program ("IEP") is inappropriate, excluding the time reasonably required for the school district to correct the problem. (Appendix at 16a). This holding is a logical extension of this Court's rulings in *Burlington v. Department of Education*, 471 U.S. 359, 370-71 (1985) and *Florence County v. Carter*, 126 L. Ed. 2d 284 (1993). In accordance with these decisions, parents who unilaterally place their children in private schools pending the outcome of litigation are entitled to reimbursement if the school district's proposed IEP was inappropriate and the private school provided the child with an appropriate education. The Third Circuit's holding in this case places students whose parents cannot afford to fund private school placements in the same position as those whose parents can afford to fund the cost of a private placement pending the outcome of litigation.

The "gross deprivation" or "bad faith" [2] standard would create an inequitable standard and would treat parents seeking reimbursement for funds paid in tuition to an appropriate private placement more favorably than those parents seeking

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2. Contrary to Central Regional's assertion, the Third Circuit standard does not conflict with its earlier decision in *Lester H.* Despite Central Regional's argument, *Lester H.* did not adopt a "good faith" standard. In fact, the court in *Lester H.* refused to decide the issue. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 873 n.12 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991).

compensatory education because they lacked the funds to unilaterally place their child in an appropriate private school. *See Miener*, 800 F.2d at 753 ("We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon their parent's ability to "front" its costs).

Federal courts have consistently rejected the notion of a different standard being required for compensatory education than for reimbursement. In *Miener*, the Eighth Circuit recognized the parallel purposes of reimbursement and compensatory education:

> We cannot agree with the defendant that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with Congressional intent. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along . . ."

Miener, 800 F.2d at 753. After citing the comparable nature of reimbursement and compensatory education, the court held that the student could receive compensatory education upon showing that she was denied a free appropriate education.

Similarly, in *Harris v. District of Columbia*, 1992 U.S. Dist. Lexis 11831 (D.D.C.), the court expressly refused to set forth a standard for compensatory education that differed from that of reimbursement and firmly stated that the standards should be alike:

> [The "gross violation" or "exceptional circumstances"] standard is not the applicable standard to use in analyzing a deprivation of education. The standard that the Supreme Court set forth in *Burlington* is applicable to the present case.

Id. at 107. As noted by the *Harris* court, in *Burlington* this Court did not demand that the plaintiff demonstrate a "gross violation" of IDEA to receive retroactive reimbursement. In the opinion of the *Harris* court, the same standard should be used when awarding compensatory education. Without finding a gross violation of the IDEA by the school district, the *Harris* court awarded plaintiff one year of compensatory education.

Citing *Harris*, and *Burlington*, the court in *McManus v. Wilmette School District*, 1992 U.S. Dist. Lexis 18167 (N.D. Ill.) concurred that the standard for relief only requires a showing that a child falls within the IDEA and has been deprived of an appropriate education. Consequently, "the absence of a 'bad faith' allegation [did] not sound the death knell of plaintiffs' amended complaint." *Id.* at 488.

Finally, the District of New Hampshire has also held:

> [T]he test for the propriety of a compensatory education award simply requires the Court to determine whether the local educational agency has failed to provide a disabled student with an appropriate IEP.

Manchester School District v. Christopher B, 807 F. Supp. 860, 871 (D.N.H. 1992). As the above decisions illustrate, the Third Circuit rule reflects the logical reasoning that claimants who have been deprived of an appropriate education under the Act

should be awarded compensatory education based upon the same showing as a claimant seeking reimbursement for the cost of a private school tuition.

Central Regional argues that the Third Circuit's holding "will result in an award of compensatory education in spite of the district's ability to demonstrate appropriate IEPs and the provision of equally appropriate special education services in support of the IEPs." (*See* Petition at 7). Because a handicapped student seeking compensatory education must first establish that a school district has failed to provide the student with an appropriate education, Central Regional's assertion lacks merit. As this Court stated in the context of a reimbursement claim:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Carter, 126 L. Ed. 2d at 293-94. The same reasoning holds true for compensatory education claims. Despite Central Regional's "parade of horribles," a school district that provides "appropriate special education services" need not worry about the Third Circuit standard.

The Third Circuit holding is a necessary and logical extension of this Court's rulings in *Burlington* and *Carter*.

Because the standard implements IDEA's guarantee of a "free appropriate public education," it should not be disturbed by this Court.

III.

THIS COURT SHOULD NOT REVIEW THE VALID AND PROPER FACTUAL FINDINGS OF THE DISTRICT OF NEW JERSEY, AS AFFIRMED BY THE THIRD CIRCUIT.

Well-established Supreme Court jurisprudence dictates that this Court not review the factual findings of this matter, as requested by Central Regional.[3] Where the Supreme Court is not acting as an initial appellate court its role centers exclusively upon declaring the supreme law of the land. *Moore's Federal Practice*, ¶ 52.12. "Under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown." *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936) (*citing Stuart v. Hayden*, 169 U.S. 1, 14 (1898)). Similarly stated:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

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3. In the second portion of this petition, Central Regional asks the Court to review the "residential placement issue", alleging, "there is no basis in this case for a finding that J.C.'s educational needs require residential placement or that the day placement IEP offered and implemented by the Central Regional School District was not educationally appropriate under *Rowley*." (*See* Petition at 12).

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949).

Central Regional is thus asking this Court to reconsider the factual issue of J.C.'s residential placement, an issue previously decided by the District Court and the Court of Appeals. Both courts validly concluded that J.C. was capable of making progress, that his fleeting progress and regression in some areas was due to an inappropriate education and that at this point, he required a residential placement for educational reasons. Because the courts below made valid factual findings, this Court should reject Central Regional's invitation to reconsider this issue.

CONCLUSION

It is respectfully submitted that Central Regional has completely failed to articulate any reason for the grant of its Petition for Writ of Certiorari. There is no conflict among the Circuit Courts of Appeals, the ruling of the Third Circuit was valid and proper and this Court is not the appropriate forum for the reconsideration of factual issues. Accordingly, Central Regional's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 16, 1996

APPENDIX A — OPINION AND ORDER IN *MELVIN ET AL. V. TOWN OF BOLTON SCHOOL DISTRICT ET AL.*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

File No. 5:88-CV-58

Cindy Melvin, a minor, by and through her guardian and next friend, Gertrude Martell, and Gertrude Martell,

Plaintiffs,

v.

Town of Bolton School District, Town of Bolton School Board; Chittenden East Supervisory Union; Harold M. Boyden, individually and as Superintendent, Chittenden East Supervisory Union; and W. Craig Roskam, individually and as Special Education Coordinator, Chittenden East Supervisory Union,

Defendants.

OPINION AND ORDER

On March 7, 1988, Cindy Melvin ("Cindy") and her mother (collectively "plaintiffs") filed this action under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (1988 ed. and Supp. IV) against the Town of Bolton School District and School Board, the Chittenden East Supervisory Union and its Superintendent Harold M. Boyden and its Special Education Coordinator W. Craig Roskam ("defendants"). Plaintiffs sought declaratory, injunctive and compensatory relief

for the defendants' failure to provide a free appropriate public education to Cindy as required by IDEA. On June 27, 1991, the parties entered into a Consent Decree which granted most of the relief which plaintiffs sought. However, the parties specifically reserved for later determination the issues of attorneys' fees and relief for Cindy after the age of twenty-two. Cindy has now turned twenty-two. Plaintiffs seek three additional years of education to compensate Cindy for a like period when defendants concededly deprived her of a free appropriate public education. The parties have consented to proceed before a Magistrate Judge for any and all proceedings in this case, including an Order of final judgment. 28 U.S.C. 636(c).

Plaintiffs have filed a motion for summary judgment claiming that because the defendants have violated IDEA, as a matter of law Cindy is entitled to relief. Defendants have filed a response to plaintiffs' motion, arguing that Cindy is no longer covered by IDEA and even if she is, she is not entitled to three years of compensatory education. For the reasons stated below, I grant plaintiffs' motion.

BACKGROUND

I. *Statutory Framework*

IDEA gives all disabled students who qualify, the right to a "free appropriate public education" (FAPE) from ages three through twenty-one. 20 U.S.C. §§ 1400(c) & 1401(a)(18)(1988 ed. & Supp. IV); 34 C.F.R. § 300.122 (1993); *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated sub. nom., Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990).

Appendix A

IDEA requires the involvement of the child's teachers, parents, and a representative of the local educational agency in the development of an "individualized education program" I (IEP). 20 U.S.C. § 1401(a) (20) (1988 ed. & Supp. IV). The "special education" program set forth in an IEP must be "specially designed instruction . . . to meet the unique needs of l a child with a disability." § 1401(a) (16).

Parental notice is required whenever the educational agency proposes or refuses to change the child's educational placement. § 1415(b)(l)(C). Parents must be given an opportunity to bring complaints about any matter relating to the child's placement. § 1415(b) (1)(E). Complaints are reviewed at an impartial due process hearing conducted by the state or local education agency. 20 U.S.C. § 1415(c). However, "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 326-27 (1988). An aggrieved party may finally appeal to federal or state court. 20 U.S.C. § 1415(e) (2).

II. *Factual and Procedural Background*

Cindy is severely emotionally disturbed, hyperactive and mentally retarded. She has a history of behavioral and emotional problems. Cindy has been eligible for special services under IDEA since 1976. Cindy was placed in a regional classroom for educable mentally retarded students from 1977 until 1982. In 1982, she changed schools and attended the Camel's Hump Middle School until June of 1985. She was placed in the Intensive Resource Room where she began to stabilize and make academic progress. In 1985, the Intensive Resource Room closed and Cindy returned to the regional program. Cindy's parents did not receive notice of the change in placement as

mandated by IDEA. Defendants also did not convene an IEP meeting to develop a program for Cindy. Defendants did not evaluate Cindy prior to the change. All of these requirements are mandated by IDEA.

Three weeks after her placement in the regional program an IEP meeting was held and it was determined that in order for Cindy to participate in the program, she needed an aide. Plaintiffs requested an aide, but defendants could not provide one. As a result, Cindy received some tutoring.[1]

The next school year, 1986 to 1987, Cindy was placed in the regional diversified occupations program in Essex Junction. Defendants failed to notify Cindy's parents of her new placement nor was an IEP meeting convened. Cindy again could not attend the program without the help of an aide. Defendants denied plaintiffs' request for an aide. Cindy stayed home and received the equivalent amount of home tutoring as in the previous school year. Finally, in school year 1987 to 1988, Cindy could not attend any placement without an aide. She received tutoring at home.

In 1988, Plaintiffs contacted an attorney to return Cindy to school. Cindy was sixteen years old by this time. Plaintiffs brought a complaint pursuant to 42 U.S.C. § 1983, alleging defendants had violated IDEA. (Paper 1). Plaintiffs alleged Cindy had been deprived of a FAPE for the school years 1985 through 1988.

The parties signed a Consent Decree on June 27, 1991, acknowledging that the defendants had violated the

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1. Cindy received approximately an hour and a half of tutoring for each school day.

requirements of IDEA. (Paper 25). After admitting liability, the defendants agreed to provide Cindy with her FAPE (her statutory right) until her twenty-second birthday, specifically referencing Cindy's IEP team and its functions. Defendants also agreed to pay plaintiffs' attorneys' fees accrued prior to April 1, 1991.

In the Consent Decree the parties agreed to reserve the issues of appropriate relief after Cindy's twenty-second birthday and attorneys' fees accrued after April 1, 1991.

> 1. Resolution of the issue of relief subsequent to Cindy Melvin's twenty-second birthday shall be reserved until November, 1992.
>
> 2. In November, 1992, the parties shall enter into negotiations regarding the relief subsequent to Cindy Melvin's twenty-second birthday for the Defendants' substantive and procedural violations as set forth in Section II above.
>
> 3. The relief provided may include only that allowed pursuant to applicable law.
>
> 4. If the parties are able to resolve the issue of relief through negotiation, their agreement shall be incorporated into a Consent Decree.
>
> 5. If the parties are unable to resolve the issue of relief through negotiations by January 15, 1993, the parties shall jointly move the Court for reinstatement of this

> action on the trial calendar of this Court for trial before the Magistrate.
>
> 6. The Plaintiffs' right to attorneys' fees accrued after April 1, 1991 shall be determined by applicable law.

Paper 25 at 8. Negotiations to resolve these issues were unsuccessful.

When Cindy was about to turn twenty-two, beyond the age specified for coverage under IDEA, plaintiffs feared defendants would attempt to "graduate" her, thereby terminating her special education. When negotiations failed, plaintiffs moved for a preliminary injunction to prevent defendants from terminating her services. This Court granted plaintiffs' motion on June 9, 1993, allowing Cindy to receive her special education pending resolution of the issue of additional compensatory education. (Paper 33).

Because in the Consent Decree defendants have admitted liability for violations of IDEA, the only issues before the Court are whether Cindy is entitled to further relief for the three-year period she was deprived of a FAPE and the amount of attorneys' fees subsequent to April 1, 1991.[2] Plaintiffs seek three more years of compensatory education. (Paper 34). Defendants argue that further compensatory education is inappropriate for Cindy. (Paper 39).

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2. Defendants' argument that Cindy is no longer entitled to the protections of IDEA because she is twenty-two was rejected by this Court when it granted plaintiffs' request for injunctive relief. *Opinion and Order*, slip op. (June 10, 3993).

Appendix A

DISCUSSION

I. *Summery Judgment Standard*

The purpose of summary judgment is to avoid useless trials by isolating and disposing of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgement is appropriate in those cases where the non-moving party has failed to produce any evidence of a genuine issue as to any material fact, and the moving party has rested his motion on a valid legal theory entitling that party to judgment as a matter of law. Fed. R. Civ. P. 56 (c). All ambiguities and inferences should be resolved in favor of the non-moving party. *Levin v. Analysis & Technology, Inc.*, 960 F.2d 314, 316 (2d Cir. 1992).

To defeat a motion for summary judgment, a party may not rest solely upon the allegations of the pleadings; the non-moving party must come forward with evidence that is more than colorable.[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). There is no issue for trial unless there is sufficient probative evidence which tends to support a claim or defense. *Id.*

II. *Remedies for Violation of the IDEA*

Once a court finds that "the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' " *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 62 U.S.L.W. 4001, 4004 (U.S. 1993) (quoting 20 U.S.C. § 1415(e)(2)). In determining the nature of

3 Defendants have failed to oppose plaintiffs' statement of material facts by filing a separate statement of material facts in dispute, as required by Local Rule 5.

the remedy "the court must consider all relevant factors." *Id.* What relief is appropriate is subject to broad interpretation. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985); *Burr*, 863 F.2d at 1078. In *Burlington*, the Supreme Court held that appropriate relief included reimbursement of the cost required to keep a child in an appropriate educational setting when the state, in violation of the Act, had failed to do so. *Burlington*, 471 U.S. at 369. The Court found this relief appropriate because it would merely require the state to "belatedly pay expenses that it should have paid all along." *Id.* at 370-71. In *Florence County* the Court approved the reimbursement of reasonable private school costs to parents who unilaterally withdraw their child from an inappropriate public school placement. *Id.* at 4002. This remedy protects those parents who can advance the cost of special education when their school system has failed to adhere to IDEA. It fails, however, to protect those parents who are financially unable to enroll their child in a private school when the state fails to place the child in a timely manner. *Harris v. Dist. of Columbia*, No. Civ. A. 91-1660 RCL, 1992 WL 205103 (D.D.C. Aug. 6, 1992).

Compensatory Education

Because tuition reimbursement is a meaningless remedy for some plaintiffs, the federal courts have extended the meaning of "appropriate relief" to include compensatory education. This insures that parents who can not afford to unilaterally place their child in a private school will have a viable remedy. *Burr*, 863 F.2d at 1071; *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, *Chester Upland Sch. Dist. v. Lester H.*, 499 U.S. 923, (1991); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991) *cert. denied*, 112 S. Ct. 982, (1992); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986).

Appendix A

In the Second Circuit compensatory education is an l acknowledged remedy. *See Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (compensatory education is an appropriate remedy to enforce [IDEA] educational rights). The court in *Burr*, explained its reasoning as follows:

> We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Id. at 1078. Moreover, the United States Department of Education finds compensatory education an appropriate remedy.[4] Thus, in the case at bar, this Court has the discretion to award compensatory education if it is an appropriate remedy for Cindy.

I reject defendants' argument that Cindy has already been compensated for the loss of three years of a FAPE. An award of compensatory education under the Act does not include a period when the defendants were "already obligated to provide that student a free appropriate education." *Manchester School District v. Christopher B.*, 807 F. Supp. 860, 869 (D.N.H. 1992).

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4. Within the Department of Education, the Office of Special Educational Programs has stated that compensatory education is an appropriate remedy to ensure a child receives the FAPE to which he or she is entitled. 17 Educ. Hand. L. Rep. 522, 523 (1991).

Cindy was deprived of appropriate services for three years. If defendants had provided these services, their obligation would have ceased when Cindy reached the age of twenty-two. The defendants remain obligated to fulfill their legal duty to provide three years of services.

Defendants have stipulated to their liability and acknowledged they violated the requirements of IDEA. As a consequence of defendants' violations, Cindy was deprived of a FAPE for three years. Cindy can only be fairly compensated by allowing her to receive three years of compensatory services beyond her twenty-second birthday. Cindy's exact services are to be determined by her IEP team, as it is the best equipped to determine Cindy's special needs. As plaintiffs agree, these services need not be provided in a school environment if another educational model is determined by the IEP team to be more suitable to Cindy's needs.

This decision does not violate the terms of the Consent Decree. In the Consent Decree the parties agreed to disagree about the extent of compensatory education after Cindy reached the age of twenty-two. The parties provided that if they could not agree about this issue, they would request a ruling from the Court. The Court has reviewed the submissions of the parties and has determined that a hearing is not required.

CONCLUSION

Plaintiffs' motion for summary judgment is GRANTED. Cindy is entitled to three additional years of compensatory services beyond her twenty-second birthday. If the parties are unable to agree on the award of accrued attorneys' fees, they shall submit appropriate memoranda addressing this issue within 21 days of the date of this order.

Appendix A

Dated at Burlington, in the District of Vermont, this 30 day of December, 1993.

s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge